TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 98.

A. W. BENNETT, PLAINTIFF IN ERROR AND APPELLANT,

vs.

SARAH GRACE BENNETT.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED SEPTEMBER 14, 1906.

(20,363.)

(20,363.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 98.

A. W. BENNETT, PLAINTIFF IN ERROR AND APPELLANT,

vs.

SARAH GRACE BENNETT.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Citation	*a*	1
Petition for writ of error	1	2
Assignment of errors	2	2
Order allowing writ of error	5	4
Writ of error	6	4
Petition for appeal	7	5
Assignment of errors on appeal	8	6
Order allowing appeal	11	7
Petition in error	12	8
Exhibit A—Transcript from district court of Lincoln county	15	9
Petition	15	9
Summons and return	22	14
Affidavit of service of application for alimony, &c.	24	15
Application for alimony, &c.	24	16
Order allowing alimony, &c.	27	18
Amended petition	28	18
Exhibit—Warranty deed, A. W. Bennett to Harry M. Bennett, May 20, 1903	36	24
Exhibit B—Statement of property of A. W. Bennett	39	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 31, 1907.

	Original.	Print.
Affidavit for publication	48	33
Notice for publication	50	34
Proof of publication	53	36
Notice for publication	54	37
Order appointing guardian *ad litem*	57	39
Order on guardian *ad litem* to answer	57	39
Order to amend return on summons	57	39
Order extending time for guardian *ad litem* to answer	58	39
Answer of guardian *ad litem*	58	40
Alias summons	59	40
Order overruling motion to set aside service of summons, denying leave to file answer, and granting time to defendant to purge himself of contempt	61	42
Order overruling motion to set aside service of summons, &c.	62	43
Order setting cause for trial	63	43
Decree	63	43
Order allowing guardian *ad litem* $100 for his services	72	49
Order overruling motion of minor defendant for new trial, &c	72	49
Order extending time to make and serve case-made	73	50
Clerk's certificate	74	50
Exhibit B—Notice of appeal by Albert W. Bennett	75	51
Clerk's certificate	75	51
Order submitting cause	77	52
Judgment	78	52
Opinion	79	53
Clerk's certificate	101	68

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to Sarah Grace Bennett:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof, pursuant to an appeal and writ of error filed in the clerk's office of the Supreme Court of the Territory of Oklahoma, wherein A. W. Bennett is plaintiff in error and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said appeal and writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this Eleventh day of August, 1906.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk Supreme Court.

b [Endorsed:] 1587. A. W. Bennett, Pl'ff in error *vs.* Sarah Grace Bennett. Citation. U. S. Marshal's Office, Guthrie, Okla. Aug. 11 1906 No. 593. Returned and filed Aug. 22 1906 Benj. F. Hegler, Clerk Supreme Court, by —— ——, Deputy.

UNITED STATES OF AMERICA,
Territory of Oklahoma, Lincoln County:

Received this writ on the 11th day of August, 1906, and served the same on the within named Sarah Grace Bennett, Defendant in Error, on the 15th day of August, 1906, by delivering Personally to the said Defendant in Error, Sarah Grace Bennett, a true and complete copy of the within Citation, in the said County of Lincoln, at Chandler.

Fees $2.00.

JOHN R. ABERNATHY,
United States Marshal,
By F. E. MASTIN, *Deputy.*

1 In the Supreme Court of the Territory of Oklahoma.

No. 1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

Petition for Writ of Error Without Supersedeas.

Comes now A. W. Bennett, plaintiff in error in the above entitled cause and, feeling himself aggrieved by the judgment and decree rendered and entered therein on the 7th. day of September, 1905;

Prays, That an order be made allowing him, said plaintiff in error, to prosecute a writ of error, without supersedeas, to the Honorable, the Supreme Court of the United States, according to the laws of the United States in that behalf made and provided, and your petitioner will ever pray.

SHARTEL, KEATON & WELLS,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed July 28, 1906. Benj. F. Hegler, Clerk Supreme Court.

2 In the Supreme Court of the Territory of Oklahoma.

No. 1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

Assignment of Errors in Support of Petition for Writ of Error.

Comes now the plaintiff in error, A. W. Bennett, and, in connection with his prayer for a writ of error, hereby assigns as errors the following rulings, findings and orders had and entered in said cause, in accordance with the opinion and judgment of the said supreme Court of Oklahoma, to-wit:—

1. The Supreme Court of Oklahoma erred in affirming the action of the judge of the court below at chambers in making a certain order for the plaintiff in error to pay into the office of the clerk of the court, for use of defendant in error, $1,000.00 temporary alimony and $100.00 attorney's fees, without due and sufficient notice having first been given to the plaintiff in error and an opportunity afforded him to be heard in opposition thereto.

2. The said court erred in affirming the action of the court below in adjudging the plaintiff in error in contempt of court for failing to comply with the order of the judge thereof at chambers to pay into the office of the clerk of the court the sum of $1,000.00 tempo-

rary alimony and $100.00 attorneys fees for the use of defendant in error.

3. The said court erred in affirming the action of the court below in adjudging the plaintiff in error in contempt of court for failing to comply with the order of the judge thereof at chambers to pay into the office of the clerk of the court the sum of $1,000.00
3 temporary alimony and $100.00 as attorneys fees for the use of defendant in error, without first having cited the plaintiff in error to show cause why he should not be so adjudged in contempt.

4. The said court erred in affirming the action of the court below in passing an order refusing to permit plaintiff in error to file his answer in said cause, unless he should within five days from the date of said order purge himself of contempt of court by complying with the order of the judge thereof at chambers to pay into the office of the clerk of the court $1,000.00 temporary alimony and $100.00 attorneys fees, for the reason that plaintiff in error had at no time been legally adjudged in contempt of court, and for the further reason that the trial court had no legal authority to enforce such a requirement as a condition precedent to the filing of said answer.

5. This court erred in affirming the action of the court below in making the order that plaintiff in error should not be permitted to answer in said cause except on condition that he, within five days, complied with the said former order of the judge at chambers to pay into the office of the clerk of the court $1,000.00 temporary alimony and $100.00 attorneys fees for the use of defendant in error.

6. The said court erred in affirming the judgment of the court below rendering a decree against said plaintiff in error for divorce and for permanent alimony, because the amended petition in said cause stated no cause of action against plaintiff in error.

7. The said court erred in affirming the action of the court below in rendering a certain judgment therein in favor of the defendant in error for permanent alimony and attorneys fees against this plaintiff in error in the sum of $6500.00 and for the recovery of certain real property therein described.

4 8. Said court erred in affirming the action of the court below in refusing to permit this plaintiff in error to make any defense to said cause alleged by defendant in error until he should comply with the former order of the judge of the trial court requiring him to pay said temporary alimony as hereinbefore set out.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed Jul- 28, 1906. Benj. F. Hegler, Clerk Supreme Court, by —— —— Deputy.

5 In the Supreme Court of the Territory of Oklahoma.

No. 1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

Order Allowing Writ of Error.

Now on this 28th day of July, 1906, upon motion of Shartel, Keaton and Wells, attorneys for above named plaintiff in error and upon filing a petition for writ of error with assignments of error attached thereto.

It is ordered, That a writ of error be and the same hereby is allowed to have reviewed before the Honorable, the Supreme Court of the United States, the judgment and decree rendered and entered herein on September 7th, 1905, without supersedeas.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[SEAL.] Attest:
BENJ. F. HEGLER,
Clerk Supreme Court.

Filed July 28, 1906.
BENJ. F. HEGLER,
Clerk Supreme Court.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable, the Judges of the Supreme Court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Oklahoma before you, or some of you, between A. W. Bennett, plaintiff in error, and Sarah Grace Bennett, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have same in the said supreme court at the City of Washington, in the District of Columbia, within thirty (30) days from the date hereof, that, the record, and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error,

what of right, according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 11th day of August, in the year of our Lord one thousand nine hundred and six.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed by

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] 1587. A. W. Bennett, Plff in Error, *vs.* Sarah Grace Bennett. Writ of Error. Filed Aug. 11, 1906. Benj. F. Hegler, Clerk Supreme Court.

7 In the Supreme Court of the Territory of Oklahoma.

No. 1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

Petition for Allowance of Appeal Without Supersedeas.

Comes now the above named plaintiff in error, A. W. Bennett, and, conceiving himself aggrieved by the judgment and decree made and entered in the above entitled cause by the said above named court on the 7th day of September, 1905, wherein and whereby it was ordered, adjudged and decreed that said above named defendant in error be granted an absolute divorce from said plaintiff in error and that she recover a judgment against him for permanent alimony and attorney's fees in the sum of six thousand five hundred ($6500.) dollars, for certain real property formerly constituting the homestead of said plaintiff in error and defendant in error and for the costs of said action amounting to — dollars, does hereby appeal from the said judgment and decree so rendered by said court on the said 7th day of September, 1905, to the Supreme Court of the United States for the reasons specified in the assignment of errors hereto attached, made a part hereof and filed herewith;

Wherefore, he prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which said judgment and decree were made, together with the opinion of the

Supreme Court of Oklahoma, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed July 28, 1906. Benj. F. Hegler, Clerk Supreme Court.

8 In the Supreme Court of the Territory of Oklahoma.

No. 1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

Assignment of Errors on Appeal.

Comes now the plaintiff in error, A. W. Bennett, and, in connection with his prayer for an appeal, hereby assigns as errors the following rulings and orders had and entered in said cause, to which exception was duly taken and preserved in said record by this plaintiff in error, to-wit:

1. The Supreme Court of Oklahoma erred in affirming the action of the judge of the court below at chambers in making a certain order for the plaintiff in error and appellant to pay into the office of the clerk of the court, for use of defendant in error, $1000.00 temporary alimony and $100.00 attorney's fees, without due and sufficient notice having first been given to the plaintiff in error and an opportunity afforded him to be heard in opposition thereto.

2. The said court erred in affirming the action of the court below in adjudging the plaintiff in error in contempt of court for failing to comply with the order of the judge thereof at chambers to pay into the office of the clerk of the court the sum of $1,000.00 temporary alimony and $100.00 attorney's fees for the use of defendant in error.

3. The said court erred in affirming the action of the court below in adjudging the plaintiff in error in contempt of court for failing to comply with the order of the judge thereof at chambers to pay into

9 the office of the clerk of the court the sum of $1000.00 temporary alimony and $100.00 as attorney's fees for use of defendant in error, without first having cited the plaintiff in error to show cause why he should not be so adjudged in contempt.

4. The said court erred in affirming the action of the court below in passing an order refusing to permit plaintiff in error to file his answer in said cause, unless he should within five days from the date of said order purge himself of contempt of court by complying with the order of the judge thereof at chambers to pay into the office of the clerk of the court $1,000.00 temporary alimony and $100.00 attorney's fees, for the reason that plaintiff in error had at

no time been legally adjudged in contempt of court, and for the further reason that the trial court had no legal authority to enforce such a requirement as a condition precedent to the filing of said answer.

5. This court erred in affirming the action of the court below in making the order that plaintiff in error should not be permitted to answer in said cause except on condition that he, within five days, complied with the said former order of the judge at chambers to pay into the office of the clerk of the court $1,000.00 temporary alimony and $100.00 attorney's fees for the use of defendant in error.

6. The said court erred in affirming the judgment of the court below rendering a decree against said plaintiff in error for divorce and for permanent alimony, because the amended petition in said cause stated no cause of action against plaintiff in error.

7. The said court erred in affirming the action of the court below in rendering a certain judgment therein in favor of the defendant in error for permanent alimony and attorney's fees against this plaintiff in error in the sum of $6500.00 and for the recovery of certain real property therein described.

10 8. This court erred in affirming the action of the court below in refusing to permit this plaintiff in error to make his defense to said cause until he should comply with the order of the judge of the trial court requiring him to pay said temporary alimony as hereinbefore set out.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed Jul- 28 1906. Benj. F. Hegler, Clerk Supreme Court, by —— ——, Deputy.

11 In the Supreme Court of the Territory of Oklahoma.

No. 1587.

A. W. Bennett, Plaintiff in Error,
vs.
Sarah Grace Bennett, Defendant in Error.

Order Allowing Appeal.

Now, on this 28th day of July 1906, it is ordered that the appeal be allowed as prayed for in the above entitled cause.

JNO. W. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[SEAL.]

Attest:
BENJ. F. HEGLER,
Clerk Supreme Court.

Filed July 28, 1906.
BENJ. F. HEGLER,
Clerk Supreme Court.

12 In the Supreme Court of the Territory of Oklahoma.

No. 1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

Petition in Error.

The said A. W. Bennett, plaintiff in error complains of the said defendant in error, for, that the said Sarah Grace Bennett, defendant in error at the April term of the district court of Lincoln County, recovered a decree of absolute divorce, and judgment for alimony, by the consideration of the said court from and against the said A. W. Bennett, in a certain action then pending in said court wherein the said Sarah Grace Bennett was plaintiff and the said A. W. Bennett and Harry M. Bennett were defendants. A certified copy of the transcript of the record of said court in said case is hereto attached, marked exhibit "A" and made a part of this petition in error; and the said A. W. Bennett avers that there is error in said record and proceedings in this, to-wit:

First. The judge in chambers erred in making the order for plaintiff in error to pay into the office of the clerk of the court for the use of defendant in error, $1000.00 temporary alimony and $100.00 attorney's fees without due and sufficient notice having first been given to plaintiff in error.

Second. The court erred in adjudging the plaintiff in error in contempt of court for failing to comply with the order of the judge in chambers to pay into the office of the clerk of the court the sum of $1000.00 temporary alimony and $100.00 attorney fees for the use of defendant in error.

Third. The court erred in adjudging the plaintiff in error in contempt of court for failing to comply with the order of the judge in chambers to pay into the office of the clerk of the court the sum of $1000.00 temporary alimony and $100.00 as attorney fees for
13 the use of the defendant in error without having first cited plaintiff in error to show cause why he should not be so adjudged in contempt.

Fourth. The court erred in refusing to permit plaintiff in error to file his answer instanter in said cause unless he should within five days from the date of said order purge himself of contempt of court by complying with the order of the judge in chambers to pay into the office of the clerk of the court $1000.00 temporary alimony and $100.00 for attorney fees, for the reason that plaintiff in error had at no time been legally adjudged in contempt of court.

Fifth. The court erred in making the order that plaintiff in error should not be permitted to answer in said cause except on condition that he, within five days complied with the former order of the judge in chambers to pay into the office of the clerk of the court $1000.00

temporary alimony and $100.00 for attorney's fees for the use of defendant in error.

Sixth. The court erred in rendering the decree against said plaintiff in error because the amended petition in said cause stated no cause of action against plaintiff in error.

Seventh. The court erred in rendering the decree for divorce and judgment for alimony in favor of defendant in error and against plaintiff in error after having refused to permit said plaintiff in error to answer in said cause and defend against defendant in error's petition.

Plaintiff in error further says that within ten days after the rendition of the decree and judgment of the court in said cause, to-wit: on September 30, 1904, the plaintiff in error filed in the office of the clerk of the district court of Lincoln County, Oklahoma, a notice of his intention to appeal said cause to the supreme court of the Territory of Oklahoma, a certified copy of which notice is hereto attached, marked exhibit "B" and made a part of this petition in error.

Wherefore, the plaintiff in error prays, that said judgment
14 so rendered may be reversed, set aside and held for naught, and that said cause may be remanded to the district court of Lincoln County, Oklahoma Territory, with instructions to permit plaintiff in error, defendant below, to answer and defend against plaintiff's petition in said cause and that plaintiff in error be restored to all rights he has lost by the rendition of such judgment, and for such further relief as to the court may seem just.

A. W. BENNETT,
Plaintiff in Error,
By CHARLES B. WILSON, JR., AND
EMERY A. FOSTER,
His Attorneys.

Filed Aug. 26 1904,
BENJ. F. HEGLER,
Clerk Supreme Court.

15 EXHIBIT "A."

Transcript.

In the District Court of Lincoln County, Oklahoma Territory.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT, Defendant.

Petition.

Sarah Grace Bennett plaintiff herein, for her cause of action against Albert W. Bennett defendant herein complains and alleges:

1.

That plaintiff and defendant on the 22nd day of April, 1902, in the city of Keokuk, State of Iowa; were joined in lawful wedlock, and since that time have lived together by reason of the marriage relations. That plaintiff is a *bona fide* resident of Lincoln County, Oklahoma Territory, and has been such *bona fide* resident for more than one year next preceding the filing of this petition. That she, during this marriage relations, has at all times and under all circumstances conducted herself toward defendant as a faithful and obedient wife; but without cause or justification on the part of the plaintiff he has broken his marriage vows, at divers times hereinafter mentioned and is guilty of extreme cruelty toward your petitioner, greatly endangering her life, and has greatly injured her mentally and physically by reason of defendant's cruel treatment, as set forth in plaintiff's petition.

2.

This cruel treatment complained of by your petitioner commenced abou three months after the plaintiff and defendant were married, at which time defendant would complain of and to the plaintiff when plaintiff would purchase provisions and many other necessaries of life, and these complaints were nearly an every-day occurrence, which irritated the plaintiff, and defendant would make com-
16 plaints to plaintiff that she should not burn so much wood, when it was necessary to burn the wood complained of, to keep the home comfortable and warm.

3.

That defendant about the time that these first complaints were made learned or became satisfied in his own mind that he had caused your petitioner to become pregnant; this irritated and very much displeased defendant and thereafter, defendant continued to find fault with plaintiff and would plan buggy rides, and would represent to plaintiff that they would take a ride in the town for a short time, and then the defendant would take plaintiff to the country a distance between five and ten miles; that he would drive in a reckless and careless manner, and with considerable speed, over the rough and rocky roads, thereby causing the plaintiff great pain, and suffering by reason of her pregnancy. That plaintiff would ask and request defendant to drive slow and be more careful, defendant would pay no attention to the requests of plaintiff, and instead of driving slower, would drive faster, and continue in that manner until the plaintiff could not stand it, and the physical pain would become so great the plaintiff could not suppress her feelings, and would break down and cry. And these matters complained of in this paragraph, occurred on an average of three or four times a week which was during the four months next prior to the birth of the child.

That at one time in October, 1902, when the plaintiff was in a serious condition of health by reason of her pregnancy, defendant

compelled her on divers occasions to go out some four or five miles and pick up pecans to send to his boy Harry in Virginia, and on these trips plaintiff would request defendant to drive slow; yet notwithstanding the requests, he would drive faster, and more reckless, running the buggy against stumps, causing plaintiff great mental anguish and physical suffering; and one time in March, 1903, and less than a month before she gave birth to her child, defendant compelled her to go with him in the buggy and drive out
17 into the country and came to a stream of water which runs into Deep Fork and the bridge over the creek was out, and the water appeared to plaintiff to be very deep and she requested defendant not to cross the stream; that he persisted and did cross with plaintiff in the buggy, and this conduct of defendant against plaintiff, caused plaintiff to break down and cry, and she implored defendant not to go farther with her, and if he insisted on going farther to let her out and she would remain there until he returned as she could not stand it, to go farther, and yet defendant persisted and went some distance farther with *defendant*, which produced great suffering mentally and physically.

That this conduct of the defendant produced upon the mind of the plaintiff that his sole object in driving her over these rough roads referred to and through the water holes was for the purpose of causing plaintiff to have a miscarriage.

4.

That within one week of the birth of plaintiff's child, defendant cruelly treated your petitioner by insisting over the phone that she should go out at the stable and in the stable yard where he had placed a colt that had been badly cut up on the barb wire having great gaping lacerated wounds, that plaintiff should remain out in this stable yard and watch this colt. Plaintiff informed defendant that she could not in her condition stand it to go out and look at the colt mangled as it was as she could not stand it to look at those wounds, yet notwithstanding her informing defendant of these things, defendant persisted and insisted, until plaintiff gave up, desiring to avoid any trouble that might result by any further refusal.

5.

That upon the 19th day of April, 1903, plaintiff gave birth to a boy and afterwards named James Richard Bennett, and that the defendant refused and omitted staying at the house where the plaintiff and child was, to care and look after plaintiff's and child's welfare, but left his home during the daytime and took his meals at the restaurant or hotel when in truth and in fact meals were
18 cooked at this home. And this conduct of the defendant in neglecting your petitioner during her confinement, caused the plaintiff mental suffering and, while she was at the worst during her confinement, when he would come in at night or go away in the morning, come to plaintiff's bed and make complaints that this baby boy just born was costing him too much money to care for it; these complaints and many others that he would make during this

time that he would come to the house greatly irritated plaintiff and caused her mental anguish and physical suffering.

6.

That soon after the child was born and while the plaintiff was very sick, and when she was having chills, plaintiff asked defendant to get a hot water bag so as to keep her warm, the same being recommended by the doctor, W. H. Davis, who was attending plaintiff during her confinement and defendant knew of the doctor prescribing the same; that defendant refused to get the hot water bag, as asked by the plaintiff to do. And when Mrs. Hill, the mother of the plaintiff, said she would get one and pay for it herself, as she, plaintiff, needed one, defendant flew in a rage of passion and declared to the mother of the plaintiff, in plaintiff's presence, who was at the time dangerously sick, that no hot water bag should be brought on the place, and if plaintiff's mother should bring one there she should leave the place immediately.

And about this time the defendant was asked and requested to get some medicated cotton for plaintiff to be used on the parts that was lacerated in child birth, which he at that time refused to do.

That defendant has since the marriage relations been guilty of extreme cruelty in this:

Defendant, over the objections and protest of your petitioner, has had excessive sexual indulgence with plaintiff which has been invariably every day, and have been two or three times a day before conception; and after conception defendant continued in his sexual intercourse with your petitioner every day and sometimes
19 twice a day, for the first five months thereafter; and continued his sexual relations with your petitioner and over her objections and protests up to within two days before her child was born. That plaintiff would say to defendant that this sexual connection was very painful and would injure her and the child and ask that he would not insist, as it made her nervous, and caused her great pain and mental suffering, but defendant would insist on his "marital right" and would say to plaintiff "It will not hurt you nor will it hurt the child." And your petitioner was persuaded and compelled to submit and allow defendant to satisfy his brutal animal passion, when in truth and in fact her submission each time caused your petitioner mental and physical suffering, and by reason of defendant's excessive sexual indulgence during the time of plaintiff's pregnancy, he has caused her physical injury and very greatly deteriorated her health and endangered her life.

And your petitioner further alleges that defendant has been guilty of great cruelty toward your petitioner in this: that during plaintiff's and defendant's marital relations defendant has at divers times before pregnancy and over the objections and protests of plaintiff had sexual intercourse with plaintiff during her menstruation, and defendant was acquainted with the fact that plaintiff had the period of monthly flow, at the time of his sexual relations with plaintiff, which relations made it dangerous to plaintiff's health and life.

By reason of the conduct of defendant, plaintiff could not longer

continue to cohabit with defendant, as her health and life was endangered, and on the 20th day of May, 1903, left her home in Chandler and has taken up a residence with her mother in the city of Chandler, Lincoln County, Oklahoma Territory.

Second.

Plaintiff as a second cause of action alleges: that defendant is the owner of real estate in the county of Lincoln which is hereinafter described in her petition and the owner of real estate in other places in Oklahoma and Indian Territory and in the State of Virginia. Plaintiff is unable to describe at this time the lands and tenements owned by the defendant outside of Lincoln County; that the lands and tenements owned in Lincoln County is of the value of $20,610.00; and the lands and tenements owned by defendant in Oklahoma outside of Lincoln County, is of about the value of $4000.00 and that owned by defendant in the Indian Territory is of about the value of $5000.00; and that in Virginia about $5000.00.

That defendant has quite considerable money on deposit in the banks of Chandler, as plaintiff is informed and believes, amounting in the aggregace to about $10,000.00; and other personal property such as chattel mortgages of the value and denomination of about $10,763.52, and also is the owner and holder of several real estate mortgages of about the value of $4,440.50.

That defendant by his first wife has a son Harry M. Bennett, living in the state of Virginia, 11 years of age defendant was informed that plaintiff intended to bring suit for a divorce defendant immediately and on the same day employed counsel and conveyed by deed certain real estate in Chandler, and other real estate in Lincoln County, excepting their home in Chandler. That said conveyance was made to defendant's son Harry M. Bennett, a minor, and said conveyance was for the purpose and only purpose of defrauding the plaintiff out of any right that she might have in his real estate by reason of their marriage relation; and that said conveyance is without a valuable consideration, and that, unless defendant is restrained from making any further disposition of his real and personal property, he will continue in conveying his property, and placing it in a condition which will result in defrauding your petitioner out of her legal and equitable rights, in the property owned and possessed by him. A copy of the deed conveying to Harry M. Bennett
21 his property is hereto attached, marked exhibit "A" and made a part of this petition. That plaintiff also has attached to this petition a list of other property that defendant is the owner and holder of, which list is hereto attached and marked Exhibit "B" and made a part hereof.

Plaintiff is without means to carry on this suit for divorce and for the support of herself and child, and is sick and unable to get about and do work of any kind.

Wherefore, plaintiff asks a decree of the court dissolving the marital relations now existing between plaintiff and defendant, and

$1,000.00 temporary alimony to assist her in carrying on her suit and as support for herself, and the sum of $500.00 for the support of her child. And the further sum of $500.00 attorneys' fees for her attorneys. And a just division of defendant's real and personal estate as permanent alimony. And that the conveyance made by defendant to his son be declared as not affecting any rights that plaintiff has in the property conveyed by defendant, and such other equitable relief as the court may think equitable and just; and that plaintiff be decreed the care, custody and control of their child James Richard Bennett; and that she recover her costs of said suit.

DECKER & WAGONER,
Att'ys for Plaintiff.

TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

Sarah Grace Bennett, being duly sworn deposes and says: that she is the plaintiff in the above entitled action, and that she has read the above and foregoing petition, and the matters and things therein set forth are true.

SARAH GRACE BENNETT.

Subscribed and sworn to before me this 21 day of May A. D. 1903.
[SEAL.] E. W. HOYT,
Notary Public.

My com. ex. Nov. 7, 1903.

(Endorsed on back:) No. 1455 Ent. In District Court,
22 Lincoln County, Oklahoma Territory. Sarah Grace Bennett, Plaintiff, *vs.* Albert W. Bennett, Defendant. Petition. Filed Lincoln County, O. T., May 21, 1903. T. A. Neal, Clerk, by D. J. Norton, deputy. Decker & Wagoner, attorneys for plaintiff.

Summons.

UNITED STATES OF AMERICA.

TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

In the District Court within and for Lincoln County, Oklahoma Territory, First Judicial District, at the Court House in Chandler.

The Territory of Oklahoma to the sheriff of Lincoln county, in said Territory, Greeting:

You are hereby commanded to notify the defendant Albert W. Bennett That he has been sued by the plaintiff Sarah Grace Bennett in the District Court, sitting in and for said county of Lincoln, and that unless he answer by the 16th day of June A. D. 1903 the petition of the said plaintiff against said defendant, filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons, on the 26 day of May, A. D. 1903.

Witness my hand, and seal of said court, affixed at my office in Chandler, Lincoln County, Oklahoma Territory, this 21 day of May A. D. 1903.

[SEAL.]

T. A. NEAL,
Clerk of the District Court,
By D. J. NORTON, *Deputy.*

23 TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

Received this writ May 22, 1903, and, as commanded therein, I summoned the following person of the defendant within named at the times following, to-wit:

Albert W. Bennett, May 22, 1903, at 8.55 A. M. by leaving for said defendant at his usual place of residence in said county, a true and certified copy of the within summons, with all the endorsements thereon.

WM. TILGHMAN, *Sheriff,*
By WM. H. CRUME, *Deputy.*

Service and return, first person	$ .50
1 copy	.25
Total	$ .75

(Endorsements on back:) No. 1455. Ap. Doc. 4 Page —. District Court, Lincoln County, Oklahoma Territory. Sarah Grace Bennett *vs.* Albert W. Bennett. Issued May 21, 1903. Returnable May 26, 1903. Decker & Wagoner, Attorney for Plaintiff. Filed Lincoln County, O. T. May 22, 1903. T. A. Neal, Clerk, by D. J. Norton, deputy.

Suit Brought for Divorce and Alimony.

If the defendant fails to answer, judgment will be taken for the sum of $— with interest at the rate of — per cent per annum, payable annually from the — day of —— 190–; $— Attorney's fee and cost of suit.

T. A. NEAL,
Clerk of the District Court,
By D. J. NORTON, *Deputy.*

24 TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

In the District Court of Lincoln County, Oklahoma.

SARAH GRACE BENNETT, Plaintiff,
vs.
ALBERT W. BENNETT, Defendant.

Affidavit.

Victor S. Decker, being first duly sworn, says: that on the 21 day of May A. D. 1903, as agent for the plaintiff in the above entitled

cause, that he went to the office, of the defendant, Albert W. Bennett, and served an exact copy of the within application for Temporary Alimony and restraining order upon the said defendant, Albert W. Bennett, by offering to him an exact copy of said application for Temporary Alimony and informing him of the contents thereof, which application the said defendant, Albert W. Bennett, refused to receive.

VICTOR S. DECKER.

Subscribed and sworn to before me this 21 day of May A. D. 1903.
[SEAL.] RAY McELHINNEY,
Notary Public.

My comm. expires March 6th, 1906.

In the District Court of Lincoln County, Oklahoma Territory.

SARAH GRACE BENNETT, Plaintiff,
vs.
ALBERT W. BENNETT, Defendant.

Application for Temporary Alimony and Restraining Order.

Comes now the plaintiff Sarah Grace Bennett, and alleges and says: That she is the plaintiff in the action brought for divorce and permanent alimony in said court against the defendant; that she has charged in *per* petition against the defendant extreme cruelty, and that defendant is the owner of real estate and personal property of the reasonable value of $40,000.00 as she has been informed by the defendant and believes, and that she has set forth in her petition as near as she can a description of his real and personal estate. That he has been receiving information from plaintiff that she intended to commence proceedings against him for divorce and alimony, made disposition of quite considerable of his real estate as shown by the record in said county, by having same conveyed to his son Harry M. Bennett, of the age of 11 years, who is his son by his first wife. And that said conveyance is without a valuable consideration, and was made for the purpose of defrauding your petitioner and applicant of her legal and equitable rights, in said property. And that she asks that defendant be restrained from making any further disposition of any of his property real or personal in the Territory of Oklahoma, and that until this action has been finally tried, and plaintiff's rights in the premises passed on by the court. That defendant be ordered to pay into court for the plaintiff the sum of $1,000.00 temporary alimony to support her and carry on her suit, as she is unable on account of sickness and late confinement to do work of any kind or character. And that he also be ordered to pay into court for the support and maintenance of the child born to plaintiff and defendant the sum of $500.00 as temporary alimony and the further sum of $500.00 for her attorneys; as she is unable and without means to pay counsel and carry on her suit.

That the petition filed in said cause and affidavits will be presented to the court in support of this application.

DECKER & WAGONER,
Att'ys for Pl'ff.

TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

Personally appeared before me a notary public Sarah Grace
26 Bennett, who being by me first duly sworn says: That she is the plaintiff in the above entitled cause, and that she has read the above and foregoing application, and the matters and things therein set forth are true.

SARAH GRACE BENNETT.

Subscribed and sworn to before me, this 21 day of May A. D. 1903.

[SEAL.] E. W. HOYT, *Notary Public.*

My Com. expires, on the 7 day of Nov. A. D. 1903.

Albert W. Bennett, defendant in the above entitled cause, you are hereby notified that the above and foregoing application will on the afternoon of Saturday May 23, 1903, be presented to the Honorable John H. Burford, Judge, of said court at Chambers in Stillwater, Payne County, Oklahoma Territory, to be acted on by him and the petition filed in said cause referred to in said application and affidavits in support of this application will also be presented to said judge at said time and place.

DECKER & WAGONER,
Att'ys for Plaintiff.

Service of the above application for temporary alimony and restraining order is hereby acknowledged to have been served on me A. W. Bennett this 21 day of May A. D. 1903.

——.

(Endorsement on back:) No. 1455. In District Court, Lincoln County, Oklahoma Territory. Sarah Grace Bennett, Plaintiff, *vs.* Albert W. Bennett, Defendant. Application for Temporary Alimony and Restraining Order.

Filed. Lincoln County, O. T. May 25, 1903, T. A. Neal, Clerk, by D. J. Norton, Deputy. Decker & Wagoner, Attorneys for plaintiff.

27 District Court Journal 9, page 52. In vacation of the April Term, 1903.

In the District Court of Lincoln County, Oklahoma Territory.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT, Defendant.

Temporary Order for Alimony.

Now on this 23rd day of May, 1903, this cause comes on to be heard before the Hon. John H. Burford, Judge of the District Court of Lincoln County, Oklahoma Territory, in chambers, in the city of Stillwater, O. T., upon the application and motion of the plaintiff for an order granting this plaintiff temporary alimony; suit money and attorneys fees; the plaintiff appeared by her attorneys Decker & Wagoner, and the defendant appeared not.

And the court being fully advised in the premises, from the petition of the plaintiff, and the evidence adduced upon this hearing, finds that the plaintiff should be granted temporary alimony and suit money and attorneys' fees herein.

And upon further consideration of said application and motion, the court finds that the defendant should be restrained from in any manner disposing of any of his personal property or any of his real estate, as prayed for in said motion and application.

It is therefore considered, ordered and adjudged, that the defendant pay into the office of the clerk of the district court of Lincoln County, Oklahoma, within ten days from this date, the sum of one thousand dollars, for the use and benefit of the plaintiff, as and for temporary alimony and suit money, and the further sum of one hundred dollars, as and for the payment of plaintiff's attorneys fees.

It is further considered, ordered and adjudged that the defendant, Albert W. Bennett, be and he is hereby restrained and enjoined from in any manner selling or disposing of or in any manner incumbering any of his real or personal property.

JOHN H. BURFORD,
Judge of the District Court of Lincoln County, O. T.

28 In the District Court of Lincoln County, Oklahoma Territory.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT and HARRY M. BENNETT, a Minor, by His Next Friend and Guardian, A. W. BENNETT, His Father, Defendants.

Amended Petition.

Sarah Grace Bennett, plaintiff herein, for her cause of action against the defendants herein, complains and alleges:

1.

That plaintiff and defendant Albert W. Bennett on the 22 day of April, 1902, in the city of Keokuk in the State of Iowa were joined in lawful wedlock, and since that time have lived together by reason of the marriage relations to the time hereinafter mentioned.

That plaintiff is a *bona fide* resident of Lincoln County, Oklahoma Territory, and has been such *bona fide* resident for more than one year next preceding the filing of this petition. That she during this marriage relations has at all times, and under all circumstances, conducted herself toward defendant, as a faithful and obedient wife; but without cause or justification on the part of the plaintiff he has broken his marriage vows, at divers times hereinafter mentioned and is guilty of extreme cruelty towards your petitioner, greatly endangering her life, and has greatly injured her mentally and physically by reason of defendant's cruel treatment, as set forth in plaintiff's petition.

2.

This cruel treatment, complained of by your petitioner, commenced about three months after the plaintiff and defendant were married, at which time defendant would complain of and to the plaintiff when plaintiff would purchase provisions and many other necessaries of life. And these complaints were nearly an every day occurrence, which irritated the plaintiff, and defendant would make complaints, to plaintiff, that she should not burn so much wood, when it
29 was necessary to burn the wood complained of, to keep the home comfortable and warm.

3.

That defendant about the time that these first complaints were made learned or became satisfied in his own mind that he had caused your petitioner to became pregnant; this irritated and very much displeased defendant and thereafter defendant continued to find fault with plaintiff and would plan buggy rides, and would represent to plaintiff that they would take a ride in the town for a short time and then the defendant would take plaintiff to the country a distance between five or ten miles; that he would drive in reckless or careless manner and with considerable speed over the rough and rocky roads thereby causing the plaintiff great pain and suffering by reason of her pregnancy. The plaintiff would ask and request defendant to drive slow and be more careful, defendant would pay no attention to the request of plaintiff, and instead of driving slower would drive faster, and continued in that manner, until the plaintiff could not stand it and the physical pain would become so great that the plaintiff could not suppress her feelings and would break down and cry. And these matters complained of in this paragraph occurred on an average of three or four times a week, which was during the four months next prior to the birth of the child.

That one time in October, 1902, when the plaintiff was in a serious condition of health by reason of her pregnancy, defendant compelled her on divers occasion to go out some four or five miles and

pick up pecans to send to his boy Harry in Virginia, and on these trips plaintiff would request defendant to drive slow yet notwithstanding the request he would drive faster and more reckless running the buggy against stumps and rocks, causing plaintiff great mental anguish and physical suffering; and one time in March, 1903, and less than a month before she gave birth to her child defendant compelled her to go with him in the buggy and drive out into the country and they came to a stream of water which
30 runs into Deep Fork the bridge over the creek was out, and the water appeared to plaintiff to be very deep, and she requested defendant not to cross the stream but he persisted, and did cross with plaintiff in the buggy and this conduct of defendant against the plaintiff caused plaintiff to break down and cry, and she implored defendant to not go farther with her, and if he insisted on going farther, to let her out, and she would remain there until he returned, as she could not stand it to go farther, and yet defendant persisted and went some distance farther with plaintiff, which produced great suffering mentally and physically.

That this conduct of the defendant produced upon the minds of the plaintiff that his sole object in driving her over these rough roads referred to and through waterholes, was for the purpose of causing plaintiff to have a miscarriage.

4.

That within one week of the birth of plaintiff's child defendant cruelly treated your petitioner by insisting over the phone that she should go out at the stable and in the stable yard, where he had placed a colt that had been badly cut up on the barb wire, having great, gaping lascerated wounds, that plaintiff should remain out in this stable yard and watch this colt. Plaintiff informed defendant that she could not in her condition stand it to go out and look at the colt mangled as it was, as she could not stand it to look at those wounds. Yet notwithstanding her informing defendant of these things defendant persisted and insisted, until plaintiff gave up desiring to avoid any trouble that might result by any further refusal.

5.

That upon the 19 day of April, 1903, plaintiff gave birth to a boy, and afterwards named James Richard Bennett, and that the defendant refused and omitted staying at the house, where the plaintiff and child was to care and look after plaintiff's and child's welfare, but left his home during the day time and took his meals at the res-
31 taurant or hotel when in truth and in fact meals were cooked at his home. And this conduct of the defendant in neglecting your petitioner, during her confinement, caused the plaintiff mental suffering, and while she was at the worst during her confinement, when he would come in at night or go away in the morning, come to plaintiff's bed and make complaints that this baby boy just borned was costing him too much money to care for it. These complaints and many others that he would make during this time, that

he would come to the house greatly irritated plaintiff and caused her mental anguish and physical suffering.

6.

That soon after the child was born and while the plaintiff was very sick, and when she was having chills, plaintiff asked defendant to get a hot water bag, so as to keep her warm, the same being recommended by the doctor, W. H. Davis, who was attending plaintiff during her confinement, and defendant knew of the doctors prescribing same. That defendant refused to get the hot water bag, as asked by the plaintiff to do. And when Mrs. Hill the mother of the plaintiff said she would get one and pay for it herself, as she plaintiff needed one, defendant flew into rage of passion and declared to the mother of plaintiff, in plaintiff's presence who was at the time dangerously sick, that no hot water bag should be brought on the place, and if plaintiff's mother should bring one there, she should leave the place immediately.

And about this time defendant was asked and requested to get some medicated cotton for plaintiff, to be used on the parts that was lacerated in child birth which he at that time refused to do.

7.

Defendant has since the marriage relations been guilty of extreme cruelty in this:

Defendant over the objections and protest of your petitioner has had excessive sexual indulgence with plaintiff, which has
32 been invariably every day, and have been two or three times a day before conception; that after conception defendant continued in his sexual intercourse with your petitioner every day and sometimes twice a day for the first five months thereafter; and continued his sexual relations with your petitioner and over her objections and protest up to within two days before her child was born. The plaintiff would say to defendant, that this sexual connection was very painful and would injure her and her child and ask that he would not insist, as it made her nervous and caused her great pain and mental suffering, but defendant would insist on his "marital right" and would say to plaintiff "It will not hurt you nor will it hurt the child," and your petitioner was persuaded and compelled to submit and allow defendant to satisfy his brutal animal passion, when in truth and in fact her submissions each time caused your petitioner mental and physical suffering, and by reason of defendant's excessive sexual indulgence during the time of plaintiff's pregnancy, he has caused her physical injury and very greatly deteriorated her health and endangered her life.

And your petitioner further alleges that defendant has been guilty of great cruelty toward your petitioner in this that during plaintiff and defendant's marital relation defendant has at divers times before pregnancy and over the objections and protests of plaintiff had sexual intercourse with the plaintiff during her menstruations, and defendant was acquainted with the fact, that plaintiff had the period of

monthly flow at the time of his sexual relation with plaintiff which relation made it dangerous to plaintiff's health and life.

By reason of the conduct of defendant plaintiff could no longer continue to co-habit with defendant, and on the 20 day of May 1903 left her home in Chandler and has taken up a residence with her mother in the city of Chandler, Lincoln County, Oklahoma Territory.

Second. Plaintiff as a second cause of action alleges that
33 defendant A. W. Bennett is the owner of real estate in the county of Lincoln which is hereafter described in her petition, and the owner of real estate in other places in Oklahoma and Indian Territory, and in the State of Virginia, plaintiff is unable to describe at this time the lands and tenements owned by defendant outside of Lincoln County, that the lands and tenements, owned by defendant in Lincoln County, is of the value of $20,610.00, and the lands and tenements owned by defendant in Oklahoma outside of Lincoln County is of the value of $4,000.00, and that owned by the defendant in the Indian Territory is of about the value of $5,000.00 and that in Virginia about $5,000.00.

That defendant has quite considerable money on deposit in the banks of Chandler, as plaintiff is informed and believes, amounting in the aggregate to about $10,000.00 and other personal property such as chattel, mortgages and notes of the value and denomination of about $10,763.52 and also is the owner and holder of several real estate mortgages of about the value of $4440.50.

That defendant by his first wife has a son Harry M. Bennett living in the State of Virginia 11 years of age, and defendant was informed that plaintiff intended to bring suit for a divorce, defendant immediately and on the same day employed counsel and conveyed by deed, certain real estate in Chandler, and other real estate in Lincoln County excepting their home in Chandler. That said conveyance was made to defendant's son Harry M. Bennett a minor and said conveyance was for the purpose and only purpose of defrauding the plaintiff out of any rights that she might have in this real estate, by reason of their marriage relations; and that said conveyance is without a valuable consideration, and that unless defendant is restrained from making any further disposition of his real and personal property in conveying his property and placing it in a condition which will result in defrauding your petitioner out of her legal and equitable rights in the property owned and possessed by him. A copy of the deed conveying to Harry M. Bennett his property is
34 hereto attached marked Exhibit "A" and made a part of this petition. That plaintiff also has attached to this petition a list of other property that the defendant is the owner and holder of, which list is hereto attached and marked Exhibit "B" and made a part hereof.

Plaintiff is without means to carry on this suit for divorce and for the support of herself and child, and is sick and unable to get about and do work of any kind.

Third. That Sarah Grace Bennett plaintiff herein as a further cause of action complains, alleges and says:

That the defendant A. W. Bennett is the father of Harry M. Ben-

nett and guardian, and that Harry M. Bennett being a minor of the age of 11 years your petitioner makes A. W. Bennett the father next friend and guardian defendant for said Harry M. Bennett.

That defendant A. W. Bennett on the 20 day of May 1903 after having been informed by the plaintiff that she intended to commence proceedings in said court to obtain a divorce and recover alimony for the maintenance of herself and their child, *and that defendant* executed and delivered by General Warranty deed a copy of which is attached to this petition and referred to, all of his real estate in the town of Chandler and in the county of Lincoln, Oklahoma Territory, save and except the homestead of plaintiff and defendant described as follows: Lots 19 and 20, in block 28 in Bennett's Addition to the town of Chandler in said county and Territory, and that said conveyance was made on the same day and immediately after being informed of the intention to commence this suit, and that said conveyance *was* made by the defendant as aforesaid was without consideration, the conveyance was to his son Harry M. Bennett of the age of 11 years and a resident of the state of Virginia. And that said conveyance was made for the sole purpose by the defendant to Harry M. Bennett to cheat, defraud, hinder, and delay your petitioner in her collection of alimony and suit money, attorney fees and maintenance of herself and child.

That plaintiff is without means of support for herself and
35 child, and that said property described above as the homestead has been leased by the defendant to one Mr. Perkins who is now occupying it as a tenant of defendant, without the consent of the plaintiff, and that the notes and accounts and chattel mortgages and real estate mortgages amounting to the same described in plaintiff's petition marked as exhibit was fraudulently transferred to H. M. Johnson and B. W. Buck, and that said assignment of the notes and mortgages was for the sole purpose of placing them beyond the reach of the plaintiff and with the view of cheating, defrauding, hindering and delaying her in securing temporary alimony, suit money, attorney fees, and permanent alimony for the support and maintenance of herself and child. That said pretended assignment to H. M. Johnson and B. W. Buck was made after the filing of said petition, and after notice was served on him to appear before the Honorable John H. Burford, judge of said court at Chambers in the town of Stillwater, Oklahoma Territory, on the 23 day of May, 1903. That since the 20 day of May 1903, defendant has not contributed anything whatever toward the support and maintenance of plaintiff and their child. And neglects and refuses so to do; and neglects to and refuses to pay the $1000.00 temporary alimony allowed by said judge at Chambers, and refuses to pay the $100.00 attorney fee or any part of said alimony and attorney fee and has violated said order so made.

Wherefore plaintiff asks a decree of the court dissolving the marital relations now existing between plaintiff and defendant and $1000.00 temporary alimony to assist in carrying on her suit and as support for herself and child, and the further sum of $500.00 as attorney fees, and that said homestead be decreed to her as permanent

alimony, and in addition thereto other permanent alimony as the court thinks right, equitable and just for the support of plaintiff and the child, and that the conveyances made by defendant to his son Harry M. Bennett be declared void as to the rights of the plaintiff herein, and that any judgment she may obtain as perma-
36 nent alimony be declared a lien on said estate described in this petition and subjected to the payment of said alimony, and that plaintiff be decreed the care, custody and control of their child James Richard Bennett, and such other and further relief as the court may think equitable and just, and that she recover her costs.

SARAH GRACE BENNETT.

TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

Sarah Grace Bennett being duly sworn deposeth and says: that she is the plaintiff in the above entitled action, and that she has read the above and foregoing amended petition, and the matters and things therein set forth are true.

SARAH GRACE BENNETT.

Subscribed and sworn to before me this 21 day of July A. D. 1903.

[SEAL.] T. A. NEAL, *Clerk,*
By S. J. NORTON, *Deputy.*

Warranty Deed.

This Indenture, Made this 20th day of May A. D. 1903, between A. W. Bennett party of the first part and Harry M. Bennett party of the second part:

Witnesseth: That the said party of the first part, for and in consideration of love and affection and one and no/100 dollar, the receipt of which is hereby acknowledged, does by these presents grant, bargain, sell and convey unto said party of the second part, his heirs and assigns all of the following described real estate, situated in the county of Lincoln and Territory of Oklahoma, to-wit: The north-east quarter (¼) of section fifteen (15) in township fifteen (15) north of range two (2) East of the Indian Meridian; the northeast quarter (¼) of section nineteen (19) in township sixteen (16) north of range two (2) East of the Indian Meridian;
37 Lot number one (1) in section thirty one (31) township fifteen (15) north of range two (2) East of the Indian Meridian; lot numbered four (4) in section thirty (30) in township fifteen (15) north of range two (2) east of the Indian Meridian. The south east quarter (¼) of the north east quarter of section thirty three (33) in township fourteen (14) north of range four (4) East of the Indian Meridian. The west half of the northeast quarter (¼) of section thirty three (33) in township fourteen (14) north of range four (4) East of the Indian Meridian. The North East one fourth (¼) of the North West quarter of section ten (10) in township fourteen (14) north of range four (4) East of the

Indian Meridian, except certain lots and tracts of said land heretofore deeded; a tract of land in the northeast corner of the southeast one fourth of the northwest quarter (¼) of section ten (10) in township fourteen (14) north of range four (4) East of the Indian Meridian in nearly a square form, and containing twelve (12) acres more or less, the same being all my right, title and interest in and to said forty (40) acre tract of land. Lots thirteen (13), fo*y*rteen (14) fifteen (15) sixteen (16) seventeen (17) and eighteen (18) in block numbered nineteen (19) in East Chandler also all the following described real property situated in East Chandler, Lincoln County, Territory of Oklahoma, to-wit: All of blocks numbered one (1) four (4) ten (10) and sixteen (16) Lots thirteen (13) to eighteen (18) inclusive in block numbered two (2) lots numbered nineteen (19) to twenty four (24) inclusive in block numbered three (3) lots one (1) to twelve (12) inclusive in block six (6) lots thirteen (13) to twenty four (24) inclusive in block seven (7) lots one (1) to twelve (12) inclusive in block eight (8) lots seven (7) to fifteen (15) inclusive in block nine (9) lots one (1) to four (4) inclusive in block eleven (11) lots nineteen (19) to twenty four (24) inclusive in block eleven (11) west half of lots thirteen (13) to eighteen (18) inclusive in block twelve (12) lots one (1) to six (6) inclusive, in block fifteen (15) lots one (1) and two (2) in block eighteen (18) lots seven (7) and eight (8) in
38 block twenty one (21), lots one (1) to six (6) inclusive in block twenty six (26); lots one (1) to six (6) inclusive in block eight (8) Park Heights addition to Chandler; lots seven (7) and eight (8) in block seventy seven (77) in the city of Chandler.

Lots twenty five (25) and twenty six (26) in block nine (9) in Alley's addition to the town of Stroud. Lots twenty three (23) and twenty four (24) and one (1) to six (6) inclusive, in block twenty seven (27) City of Chandler, Lincoln County. Lots number- seven (7) eight (8) and nine (9) in block eighteen (18) East Chandler, lots thirteen (13) to eighteen (18) inclusive, and lots twenty one (21) to twenty four (24) inclusive, in block twenty eight (28) in East Chandler, Lincoln County, Oklahoma.

To have and to hold the same, Together with all and singular the tenements, he*i*ditaments and appurtenances thereunto belonging, or in any wise appertaining, forever. And the said A. W. Bennett for himself, executors, or administrators, does hereby covenant, promise, and agree to and with the party of the second part that — the delivery of these presents they are lawfully seized in their own right of an absolute and indefeas*a*ble estate of inheritance, in fee simple, of and in all and *in* singular, the above granted and described premises, with the appurtenances, that the same are free, clear, discharged and unincumbered of and from all former and other grants, title, charges, estates, judgments, taxes, assessments, and incumbrances, of what nature or kind soever and that he will warrant and forever defend the same unto the said party of the second part his heirs and assigns, against said party of the first part his heirs, and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof, The said party of the first part has hereunto set his hand the day and year first above written.

A. W. BENNETT.

Exhibit "A."

TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

Before me Charles B. Wilson a Notary Public within and
39 for said county and Territory on this 20th day of May 1903 personally appeared A. W. Bennett to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth.

CHAS. B. WILSON, JR.,
[SEAL.] *Notary Public.*

My commission expires Feb. 27th, 1905.

Authentication.

TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

I hereby certify that the attached is a true and correct copy of the original instrument filed in my office at Chandler, Oklahoma Territory, on 20 May at 10 P. M. 1903.

Witness my hand 21 May 1903.

[SEAL.] VIC V. CROUCH,
Register of Deeds of Lincoln County, Okla.

"EXHIBIT B."

That the defendant A. W. Bennett, is possessed of and is the owner of the following described property, in Lincoln County, Territory of Oklahoma:

Lot Nine (9) block five (5) in the town of Chandler,
Lot- 1, 2 & 9 in Block 11, town of Chandler.
The west half of lots 13, 14 and 15, in block 12, town of Chandler.
West half of lots 16, 17, and 18, Block 12, town of Chandler.
Lots 8, in Block 22, town of Chandler.
Lots 23, and 24, in Block 27, town of Chandler.
Lots 1, 2, 3, 4 and 5 and 6, in block 27, town of Chandler.
Lots 7, 8, 9 and 10, Block 27, town of Chandler.
40 Lots 1, 2, 3 and 4, in block 28, town of Chandler.
Lot 14 in Block 28, town of Chandler,
Lots 23 and 24 in Block 36 town of Chandler,
Lot 3, in Block 51, town of Chandler,
Lots 19, 22, and 23, in block 60, town of Chandler,
Lots 17, in block 65, town of Chandler,
Lot 9, in block 92, town of Chandler,

Lots 6, and 7, in block 41, town of Chandler,
Half interest in lots 4 and 5, in block 51, town of Chandler,
Lots 7 and 8, in block 77, town of Chandler,
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, in block 1 East Chandler,
Lots 13, 14, 15, 16, 17, 18 in block 2, East Chandler,
Lots 19, 20, 21, 22, 23, 24, in block 3, East Chandler,
Lots 1, 2, 3, 4, 5, 6, in block 3, East Chandler,
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, in block 4, East Chandler,
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, in block 6, East Chandler,
Lots 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, in block 7, East Chandler,
1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 in Block 8, East Chandler,
Lots 7, 8, 9, 10, 11, 12, 13, 14, 15, in Block 9, East Chandler,
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, in block 10, East Chandler,
Lots 1, 2, 3, 4, 19, 20, 21, 22, 23, 24, block 11, East Chandler,
Lots 1, 2, 3, 4, 5, 6, in block 15, East Chandler,
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, block 16, East Chandler,
Lots 16, 17, 18, 19, 20, 21, 22, 23, 24, block 17, East Chandler,
Lots 7, 8, 9, lots 1 and 2 in block 18, East Chandler,
Lots 9, 10, 11, 12, in block 23 East Chandler,
Lots 13, 14, 15, 16, 17, 18, in block 19, East Chandler,
Lots 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, in block 28 East Chandler.
Lot 2, block 3, Tyron,
Lot- 8, 11, 12, 17, 18, 19, 20, in block 7, town of Tyron,
41 Lots 1, 2, 3, 4, 5, 6, 7, 8, in block 8, Tyron
Lots 9 and 16, in block 10, Tyron,
Lots 3, 4, 11, 12, 16, 21, in block 11, Tyron,
Lots 2, 10, 23, 24, block 12, Tyron,
Lots 1, 2, 3, 4 and 5, in block 16, Tyron
Lots 22, 23, 24 in block 6, Carney,
Lots 4, 5, and 6, in block 11, in Carney.

That the defendant A. W. Bennett, is possessed of and is the owner of the following real estate in Lincoln County, Oklahoma Territory; the west half, of the N. E. quarter (¼) of section thirty three (33) township fourteen (14) north of range four (4), E. Eight- (80) acres. S. E. Quarter, of the N. E. Quarter of Section thirty three (33), township fourteen (14) north of range four (4) E. Forty (40) acres. Lot 1, in Section thirty one (31) and lot 4, in section thirty (30) in township (15) 2 East, Eighty (80) acres.

And that Bennett and Wilcox are the owners, by warranty deed, of the S. E. Quarter of Section five (5) township fifteen (15) north of range three (3) E., 160 acres. N. E. Quarter of Sec. fifteen (15) township fifteen (15) north of range two (2) E. 160 acres, and the N. E. ¼ of Sec. 19, Twp. 16, R. 2 E. and N. E. ¼ of N. W. ¼ of Sec. 10, Twp. 14 Range 4 East I. M. containing 12 acres more or less.

That the defendant A. W. Bennett is the owner of property in the city of Guthrie, Oklahoma Territory, and Okmulgee, Indian Territory, and in Anadarko, and Hobart in Oklahoma Territory, the description and amount of which your petitioner cannot give. The defendant is also the owner of an eighty acre farm in the state of Virginia, the description of which your petitioner is unable to give.

The defendant is the owner and holder of mortgages on the following described property, and for the amounts herein stated, as shown by the records in the Register of Deeds' office in
42 Lincoln County, Oklahoma Territory.

One Mtg. on lots 13, 14, 15, 16, 17, 18 and 19, in block 8, Chandler for $140.00.

One Mtg. on lot- 1, 2, 3 and 4, in block 28, town of Chandler, $125.00;

One Mtg. on lots 23 and 24 in block 36, for $310.00 town of Chandler, and also a mortgage on the same property for $250.00.

One Mtg. on lots 20, 21, 22, 23 and 24, in block 64, in town of Chandler $127.00.

One Mtg. on lot- 9 and 10, block 69, town of Chandler for $180.00.

One Mtg. on lots 13, 14, 15, 16, 17, 18, 19, 20, 21, in block 73, town of Chandler, $250.00.

One Mtg. on lots 22, 23 and 24, block 78, town of Chandler, $125.00.

One Mtg. lots 9 and 10, in block 77, town of Chandler, $100.00.

One Mtg. on lots 16 and 17, block 86, town of Chandler, $50.00.

One Mtg. on lots 16, 17, 18, 19, in block 86, town of Chandler, $150.00 all of the above described property being in the town of Chandler, in the county of Lincoln and Territory of Oklahoma.

One Mtg., given by G. P. Chanbers, April 24, 1903, to A. W. Bennett, on the N. W. Quarter, of 28-16-3, in Lincoln County, O. T. due Oct. 15, 1903, $300.00 interest at 1 per cent. per month.

One Mtg. given by J. D. Spriggs, April 11, 1903, to A. W. Bennett, on the N. E. Quarter of 31-13-4, in Lincoln County, O. T. due April 11, 1904, for $100.00 with interest at one per cent. per month.

One mtg. given by William Kelley, on March 31, 1903, to A. W. Bennett on part of the N. E. Quarter of 19-13-4, in Lincoln County, O. T. due two years after date, for $225.00 with interest at 12 per cent. from date.

One mtg. given by J. E. Rolland, on March 20, 1903, to A. W. Bennett on the S. half of the S. E. quarter of the N. E. Quarter of 26-15-4, due January 1st, 1904, for $90.00 with interest at one per cent. per month from maturity.

One mtg. given by R. F. Dodd, October 21, 1902, to A. W. Bennett, on lots 1 and 2, and the E. half of N. W. quarter of 19-15-3, in Lincoln County, O. T. due by installments, for $690.00 interest 8 per cent.

43 One Mtg. given by M. J. Williams Dec. 30, 1902, to A. W. Bennett, on lots 11 and 12 block 5, in East Chandler, due Sept. 1st, 1903, for $150.00 one per cent. interest from maturity.

One mtg. given by Henry C. Clark, Dec. 12, 1902, to A. W.

Bennett, on lots 16, 17, 18 and 19, in block 86, in the town of Chandler, Lincoln County, O. T., due July 1st, 1903, for $150.00 with interest at one per cent. per month.

One mtg. given by E. Cheney, Nov. 12, 1902, to A. W. Bennett, on lots 9 and 10, block 77, in town of Chandler, Lincoln County, O. T. due Nov. 12, 1903, for $180.00 interest at one per cent. per month.

One mtg. given by B. L. Buck, Nov. 7, 1902, to A. W. Bennett, on lots 23 and 24, in block 26, in the town of Chandler, Lincoln County, O. T. due Nov. 7, 1903, $250.00 interest at 12 per cent.

One mtg. given by F. Rector, Nov. 29, 1902, to A. W. Bennett, on part of the S. W. quarter of 10-14-4, Lincoln County, O. T. due Nov. 29, 1904, for $153.00 with ten per cent. interest.

One mtg. given by W. A. Sampson, Dec. 1st, 1902, to A. W. Bennett, on the S. W. Quarter of sec. 1-14-2, Lincoln County, O. T., due Dec. 1st, 1904, for $225.00 interest at 8 per cent.

One mtg. given by Alfred G. Smith, Dec. 6th, 1902, to A. W. Bennett, on part of the S. E. Quarter of sec. 28-15-2, Lincoln County, O. T., due Jan. 1st, 1904, for $75.00, interest at one per cent. per month.

One mtg. given by R. A. Jennings, Nov. 12, 1902, to A. W. Bennett, on the S. W. Quarter of sec. 27-15-3, Lincoln County, O. T. due Sept. 30, 1903 for $200.00 interest at one per cent. per month.

One mtg. on Nov. 14, 1902, one mtg. given to A. W. Bennett, on lots 22, 23 and 24, in block 78, in the town of Chandler, due Nov. 14, 1903, for $125.00 interest at one per cent. per month.

One mtg. given by H. M. McFall, Oct. 5, 1902, to A. W. Bennett, on the N. Half of the S. E. Quarter of 10-15-2, Lincoln County, O. T. due Oct. 5, 1903, for $142.00 interest at 12 per cent. from maturity.

One mtg. given by R. Crummell, Oct. 28, 1902, to A. W.
44 Bennett, on *on* the E. half of the S. Quarter of Sec. 3-15-2, Lincoln County O. T. for $427.50 with interest at one per cent. per month $285. due Oct. 28, 1903, $142.50 due Jan. 1st, 1904.

One mtg. given by W. and S. Olds, March 27, 1902, to A. W. Bennett, on lots 13, 14, 15, 16, 17, 18, in block 19, in East Chandler, Lincoln County, O. T. due Jan. 1st, 1903, for $373.00 interest at 12 per cent.

One mtg. given by H. C. Clark, on May 20, 1902, to A. W. Bennett, on lots 16 and 17, in block 86, in Chandler, Lincoln Co. O. T., due Sept. 1st, 1902, for $50.00, interest at 12 per cent.

One mtg. given by N. R. Battle March 13, 1902, to A. W. Bennett, on lots 9, 10 and 11, in Block 84, in Chandler, Lincoln Co. O. T. due Jan. 1st, 1903, for $125.00 12 per cent. interest from maturity.

One mtg. given by B. L. Buck, Dec. 31, 1901, to A. W. Bennett, on lots 1, 2, 3, 4, 5, 6, in block 8, and lots 23 and 24 in block 36, town of Chandler, Lincoln Co. O. T. due Oct. 31, 1902, for $310.00.

One mtg. given by Eva Cheney July 27, 1901, to A. W. Bennett on lots 9 and 10, in block 77, in the town of Chandler, Lincoln Co. O. T., due July 27, 1902, for $100.00 interest at 12 per cent. from maturity.

One mtg. given by Thos. Chambers Oct. 14, 1902, to A. W. Bennett on lots 4, 5, 6 and 7, in block 25, in the town of Chandler, due ——, for $—, interest at ——.

45 That the defendant A. W. Bennett is the owner of the following described chattel mortgages, as the same appears of record in the Register of Deeds Office in Lincoln County, Oklahoma Territory. The same not being released on the records in said office.

Sep.	23, 1902.	C. H. Atkins	to A. W. Bennett...		$135.00
		M. B. Adamson	"	" ...	372.25
Jan.	24, 1903.	C. H. Atkins	"	" ...	50.00
Apr.	11, 1903.	C. H. Arnold	"	" ...	40.00
Apr.	18, 1903.	John Adams	"	" ...	21.65
May	8, 1903.	G. W. Atkins	"	" ...	20.00
May	2, 1902.	J. C. Branham	"	" ...	25.00
May	12, 1902.	James Brownlee	"	" ...	30.00
June	9, 1902.	John A. Brown	"	" ...	65.00
June	17, 1902.	L. E. Buchanan	"	" ...	25.00
June	19, 1902.	Elix Bridge	"	" ...	18.00
June	19, 1903.	C. P. Buck	"	" ...	25.00
Feb.	19, 1903.	L. Berry	"	" ...	30.00
Feb.	23, 1903.	J. W. Bell and J. W. Potter		" ...	35.00
March	19, 1903.	E. E. Buchanan	"	" ...	170.00
March	20, 1903.	A. C. Banta	"	" ...	57.50
March	24, 1903.	James Brownlee	"	" ...	27.50
April	1, 1903.	Howard Buyers	"	" ...	15.00
March	25, 1903.	J. W. Burleyson	"	" ...	100.00
April	1, 1903.	A. C. Banta	"	" ...	25.00
April	17, 1903.	E. C. Brady	"	" ...	85.00
April	21, 1903.	Delia Bourgeois		" ...	30.00
Feb.	21, 1903.	C. W. Bowman		" ...	27.50
April	27, 1903.	Delia Bourgeois		" ...	35.00
May	16, 1903.	Delia Bourgeois		" ...	
May	16, 1903.	G. H. Byers		" ...	10.00
July	19, 1902.	Henry C. Clark		" ...	65.00
Oct.	6, 1902.	Lee Cox		" ...	260.00
May	3, 1902.	Will Conger		" ...	24.50
Oct.	28, 1902.	R. Cromwell		" ...	285.00
		Tom Chambers		" ...	305.00
Nov.	6, 1902.	G. P. Chambers		" ...	110.00
Dec.	6, 1902.	G. P. Chambers		" ...	66.00
Dec.	23, 1902.	J. M. Cook		" ...	60.00
Jan.	3, 1903.	A. W. Carr		" ...	176.00
Jan.	13, 1903.	S. L. Carty		" ...	75.00
Jan.	27, 1903.	M. E. Cole		" ...	65.00
Jan.	30, 1903.	Claypool & Fowler		" ...	60.00
Jan.	31, 1903.	H. H. Claypool		" ...	65.00
Feb.	4, 1903.	S. M. Crakke		" ...	175.00
Feb.	9, 1903.	N. J. Coffer		" ...	35.00
Feb.	26, 1903.	Tom Chambers		" ...	25.00

Feb.	28, 1903.	Braxton Carter	" ...	17.50
March	11, 1903.	A. W. Carr	" ...	60.00
March	26, 1903.	J. A. Conger	" ...	50.00
April	7, 1903.	J. M. Clouts	" ...	90.00
April	11, 1903.	G. P. Chambers	" ...	300.00
April	22, 1903.	Tom Craft	" ...	30.00
April	24, 1903.	G. P. Chambers	" ...	300.00
April	25, 1903.	Alva Crouch	" ...	
April	28, 1903.	A. C. Catlan	" ...	20.00
April	28, 1903.	Braxton Carter	" ...	10.00
May	2, 1903.	J. M. Cook	" ...	50.00
July	1, 1902.	W. P. Dodd	" ...	55.00
Sept.	12, 1902.	John Dunlap	" ...	110.00
Dec.	16, 1902.	Elis Davis	" ...	31.50
	Total.....			4447.85

46 Chattel Mortgages—Continued.

	Am't br't for'd.....			4447.85
Feb.	9, 1903.	Perry Dawson	to A. W. Bennett...	45.00
Feb.	21, 1903.	Nathan Dunn	" ...	75.00
March	2, 1903.	R. E. Dawson	" ...	25.00
March	2, 1903.	Jim Deal	" ...	350.00
March	17, 1903.	I. S. Davidson	" ...	53.25
March	18, 1903.	Susan Davis	" ...	52.00
April	22, 1903.	J. S. Davidson	" ...	20.25
June	5, 1902.	Loyd & Kirby	" ...	7.00
Nov.	27, 1902.	B. R. Fowler	" ...	30.25
Jan.	7, 1903.	J. Fair	" ...	115.00
Jan.	7, 1903.	J. Fair	" ...	75.00
Jan.	17, 1903.	Grant Richardson	" ...	75.00
Feb.	28, 1903.	C. B. Green	" ...	25.00
April	14, 1903.	Albert Goode	" ...	44.00
May	3, 1903.	Jerry Gray	" ...	32.50
July	1, 1902.	Humphrey & Crummell	" ...	21.00
July	15, 1902.	C. J. Harper	" ...	25.00
Sept.	26, 1902.	E. H. Harper	" ...	25.00
Sept.	25, 1902.	Oliver Hodges	" ...	15.00
		C. M. Whalen	" ...	30.00
			Due M'ch 1, 1903	
March	28, 1903.	M. A. Harper	" ...	35.00
April	20, 1903.	C. G. Harper	" ...	35.00
Nov.	25, 1902.	A. J. Johnson	" ...	216.00
March	11, 1903.	A. J. Johnson	" ...	216.00
April	15, 1903.	C. H. Johnson	" ...	15.00
Dec.	29, 1902.	G. W. King	" ...	70.00
Jan.	28, 1903.	Ed. Kirby	" ...	45.00
April	3, 1903.	D. M. Kee	" ...	11.00
Feb.	21, 1903.	Geo. W. King	" ...	30.00
March	14, 1903.	A. C. Kennedy	" ...	47.00

Oct.	8, 1902.	A. A. Lockhart	"	... 57.00
Nov.	1, 1902.	J. O. Lay	"	... 165.00
Dec.	20, 1902.	—— Laughlin	"	... 83.50
Feb.	2, 1903.	Allen Leach	"	... 65.00
July	7, 1902.	O. B. and S. B. Musser	"	... 15.00
Sept.	6, 1902.	Carl Mathers	"	... 65.00
Oct.	21, 1902.	T. W. Mitchell	"	... 55.00
Dec.	6, 1902.	Thos. Murphy	"	... 75.00
Dec.	1, 1902.	Carl Mathers	"	... 75.00
Jan.	8, 1903.	Geo. and Anna Martin	"	... 100.00
March	21, 1903.	S. P. and O. B. Musser	"	... 96.50
July	2, 1902.	S. F. McGuire	"	... 30.00
Aug.	21, 1902.	Isaac McCoy	"	... 40.00
April	30, 1903.	J. R. and M. F. McAmes	"	... 90.00
Feb.	24, 1903.	H. C. Notson	"	...
March	31, 1903.	H. C. Notson	"	... 30.00
Apr.	17, 1903.	Dilliard Obedience	"	... 15.00
Sep.	30, 1902.	Larance Pearson	"	... 66.00
Oct.	21, 1901.	Sam Purdins	"	... 25.00
Dec.	2, 1902.	J. W. Perkins	"	... 41.35
Dec.	22, 1902.	Ed. Pyan	"	... 160.00
Aug.	2, 1902.	B. J. Parker	"	... 25.00
Apr.	21, 1903.	W. B. Pennington		... 145.00
Aug.	18, 1902.	P. C. Reed	"	... 35.00
Dec.	28, 1901.	J. D. Rineheimer	"	... 63.50
Oct.	14, 1902.	Mark Richardson	"	... 22.50
Nov.	8, 1902.	P. C. Reed	"	... 45.00
Dec.	8, 1902.	Mark Richardson	"	... 75.00
Jan.	14, 1903.	John Rankins	"	... 25.00
Jan.	12, 1903.	P. C. Reed	"	... 90.00
Jan.	30, 1903.	Mark Richardson	"	... 75.00
Feb.	25, 1903.	R. B. Rolland	"	... 250.00
Jan.	26, 1903.	Grant Richardson	"	... 10.00
March	30, 1903.	Ed. Ryan	"	... 160.00
Apr.	9, 1903.	J. E. Rolland	"	... 26.25
Apr.	21, 1903.	Lela Roy	"	... 35.00
Apr.	25, 1903.	Ruben E. Rolland	"	... 20.00
May	9, 1903.	P. C. Reed	"	... 15.00
				8741.05

47 Chattel Mortgages—Continued.

	Am't br't for'd			... 8741.05
May	9, 1903.	Lela Roy	"	... 17.75
Sept.	23, 1902.	Theodore Schultz	"	... 30.00
Oct.	15, 1902.	E. E. Seidel	"	... 105.00
Oct.	15, 1902.	A. J. Square	"	... 17.80
Oct.	21, 1902.	L. O. Shaw	"	... 125.00
Nov.	1, 1902.	Chas. A. Stevens	"	... 100.00
Dec.	11, 1902.	C. A. Spencer	"	... 36.00

Jan.	3, 1903.	J. F. Shutt	"	...	125.00
Jan.	7, 1903.	Theodore Schultze	"	...	24.00
Jan.	16, 1903.	W. M. Snodgrass	"	...	95.00
Jan.	28, 1903.	Tom Sprague	"	...	19.80
Jan.	31, 1903.	C. A. Spencer	"	...	24.00
Jan.	31, 1903.	S. P. Stoneking	"	...	200.00
Oct.	24, 1902.	W. H. Stephens	"	...	75.00
Feb.	9, 1903.	"	"	...	260.57
Apr.	4, 1903.	J. P. Sweat	"	...	69.00
Apr.	21, 1903.	Henry Stiles	"	...	12.50
May	9, 1903.	Jess Streeter	"	...	14.75
Apr.	25, 1903.	Henry Stites	"	...	12.50
Nov.	1, 1902.	Sabrina M. Thompson	"	...	71.50
Nov.	29, 1902.	P. M. Turner and W. M. Guy	"	...	20.09
Dec.	20, 1902.	Perry Turner	"	...	47.00
	"	W. T. Turner	"	...	200.00
Feb.	4, 1903.	James Tartly	"	...	50.00
Nov.	3, 1902.	G. W. Wilcox	"	...	236.00
		C. D. Williams	"	...	35.00
		Total amount of chattel mortgages			10763.52

(Endorsed on back:) Ent. No. 1455. In District Court Lincoln County, Oklahoma Territory. Sarah Grace Bennett, Plaintiff, *vs.* A. W. Bennett, Harry M. Bennett, Defendants. Amended petition. Filed Lincoln County, O. T. Jul- 21 1903. T. A. Neal Clerk, by D. J. Norton, Deputy. Decker & Wagoner, attorneys for plaintiffs.

48 In the District Court of Lincoln County, Oklahoma Territory.

SARAH GRACE BENNETT, Plaintiff,

vs.

A. W. BENNETT and HARRY M. BENNETT, a Minor under the Age of 14, and by His Next Friend, Guardian, and Father, A. W. BENNETT, Defendants.

Affidavit for Publication.

TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

Sarah Grace Bennett being first duly sworn deposeth and says: That she is the plaintiff in the above entitled action, and that she filed her petition for a divorce and alimony on the 20 day of May, 1903, and on the 21 day of July the petition not having been plead to she filed an amended petition for divorce on the same grounds, and for alimony, and in addition thereto asks that certain real estate described in her petition, be awarded to her, being lots 19 and 20 block 28 in Bennett's addition in the city of Chandler, Oklahoma Territory, the same being the homestead of plaintiff and defendant. And further that certain real estate described in plaintiff's petition which was at the commencement of plaintiff's action transferred by

deed to Harry M. Bennett the son of defendant a minor under the age of 14 and a resident of the state of Virginia, be set aside and subjected to the payment of pl'f's alimony. That since the commencement of this action on the 20 day of May 1903 defendant A. W. Bennett has taken up his residence in the state of Virginia, as affiant has been informed and that said Harry M. Bennett resides in the state of Virginia. That plaintiff, affiant herein has used due diligence to make service of summons upon defendants, A. W. Bennett and Harry M. Bennett in the county of Lincoln and Territory of Oklahoma, and that with due diligence she is unable to make service of summons upon the defendants, as they are residing out of the territory, and the service cannot be had in the territory.

49 That she desires to make service upon Harry M. Bennett the minor and A. W. Bennett as his guardian and father by publication and also service upon A. W. Bennett as against him, in this proceeding to obtain a divorce and alimony.

SARAH GRACE BENNETT.

Subscribed and sworn to before me this 21 day of July A. D. 1903.

[SEAL.] T. A. NEAL, *Clerk*,
By D. J. NORTON, *Dept.*

(Endorsed on back:) No. 1455 Ent. In District Court Lincoln County, Oklahoma Territory. Sarah Grace Bennett, plaintiff *vs.* A. W. Bennett and Harry M. Bennett, defendants. Aff. for Publication. Filed, Lincoln County, O. T. Jul- 21, 1903. T. A. Neal Clerk by D. J. Norton, Deputy. Decker & Wagoner, Attorneys for Plaintiff.

50 *Notice for Publication.*

In the District Court in and for the County of Lincoln and Territory of Oklahoma.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT and HARRY M. BENNETT, a Minor under the Age of 14, and by His Next Friend, Guardian, and Father, A. W. BENNETT, Defendants.

Notice of Publication to Obtain Service.

The defendants A. W. Bennett and Harry M. Bennett a minor under the age of 14, and by his next friend, guardian and father A. W. Bennett in the above entitled cause, will take notice that the plaintiff Sarah Grace Bennett has brought an action in the district court in Lincoln County, Oklahoma Territory, against the defendant A. W. Bennett to be decreed a divorce from him, and to recover alimony and the care, custody and control of their minor child James Richard Bennett, and that plaintiff be decreed lots 19 and 20 in block 28 in Bennett's Addition to the town of Chandler, in the

county of Lincoln, Oklahoma Territory the same being the homestead of plaintiff and defendant.

And also against the defendants A. W. Bennett and Harry M. Bennett a minor under the age of 14 and by his next friend, guardian and father A. W. Bennett asking that the warranty deed bearing date of May 20th, 1903 made by A. W. Bennett to Harry M. Bennett a minor conveying the following described property to-wit The North East quarter of section fifteen (15) in township fifteen (15) north of range two (2) East of the Indian Meridian: The N. E. ¼ of sec. 19, in township 16 north of range two (2) east of I. M., lot No. One (1) in section thirty-one (31) township 15 north of range two (2) East of I. M. Lot No. Four (4) in section thirty (30) in township fifteen (15) north of range two east of I. M., The south-east quarter of the north-east quarter of section thirty three (33) in township fourteen (14) north of range four east of the I. M., the west half of the north east quarter of section
51 33 in township 14 north of range four (4) east of the I. M., the north east one fourth of the north west quarter of section ten (10) in township fourteen (14) north of range four east of the I. M., except certain lots and tracts of said land heretofore deeded: A tract of land in the northeast corner of the southeast one fourth of the north-west quarter of section ten (10) in township fourteen (14) north of range four east of the I. M. in nearly a square form and containing twelve acres more or less. All the above real estate located in the county of Lincoln in the Territory of Oklahoma. Lots 13, 14, 15, 16, 17, and 18, in Block No. 19, in East Chandler also all the following described real property situated in East Chandler, Lincoln County, Territory of Oklahoma, to-wit: All of blocks number one, four, ten and sixteen. Lots 13, to 18 inclusive in block number two (2) Lots numbered 19 to 24 inclusive in block number three (3) lots one to twelve inclusive in block six (6) lots thirteen to twenty four inclusive in block seven lots one to twelve inclusive in block eight. Lots seven to fifteen inclusive in block nine. Lots one to four inclusive in block eleven. Lots nineteen to twenty four inclusive in block eleven. West half of lots thirteen to eighteen inclusive in block twelve, lots one to six inclusive in block fifteen. Lots one and two in block eighteen. Lots seven and eight in block twenty one. Lots one to six inclusive in block twenty six. Lots one to six inclusive in block eight of Park Heights addition to Chandler. Lots seven and eight in block twenty seven in the city of Chander. Lots twenty five and twenty six in block nine in Alleys Addition to the town of Stroud, lots twenty three and twenty four and one to six inclusive in block twenty seven, city of Chandler, Lincoln County. Lots Number seven, eight, and nine in block eighteen, East Chandler, lots thirteen to eighteen inclusive in block twenty eight and lots twenty one to twenty four inclusive in block twenty eight in East Chandler, Lincoln County, Oklahoma, be set aside and subjected to the payment of plaintiff's alimony and that any judgment that she may obtain as permanent alimony be declared a lien on the above described real estate and the same be sold to satisfy the judgment for alimony.

52 Now therefore, if the defendants A. W. Bennett and Harry M. Bennett a minor under the age of 14 and by his next friend, guardian and father A. W. Bennett fail to appear and answer plaintiff's petition on or before the 4th day of September A. D. 1903, said petition will be taken as true as against the defendants and judgment rendered in favor of the plaintiff and against the defendant A. W. Bennett decreeing her a divorce and alimony the care, custody and control of their minor child James Richard Bennett and decreeing to plaintiff lots 19 and 20 in block 28 in Bennett's addition to the town of Chandler, the same being the homestead of the plaintiff and obtain a judgment against A. W. Bennett and Harry M. Bennett setting aside the deed above mentioned and that any judgment that she may obtain as permanent alimony be declared a lien on said real estate above described and the same be sold to satisfy the judgment for alimony as asked for in plaintiff's petition.

SARAH GRACE BENNETT, *Plaintiff.*

Witness my hand and the seal of said court hereto affixed this 22 of July A. D. 1903.

T. A. NEAL,
[SEAL.] *Clerk of the District Court,*
By E. L. BULLARD, *Deputy.*

DECKER AND WAGONER,
Att'ys for Plaintiff.

(Endorsements on back:) No. 1455. In District Court Lincoln County, Oklahoma Territory. Sarah Grace Bennett, plaintiff *vs.* A. W. Bennett and Harry M. Bennett, defendant-. Publication notice. Filed, Lincoln County, O. T. Jul- 22, 1903, T. A. Neal, Clerk, By D. J. Norton, Deputy. Decker and Wagoner, Attorneys for plaintiff.

53 TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

J. Thos. Melton of lawful age, being first duly sworn, says that he is the business manager of the Chandler News, a weekly newspaper published and printed in Chandler, Lincoln County, Oklahoma, and of general circulation in said county and territory; that the said Chandler News has been published for more than 52 consecutive weeks next prior to the dates on which the notice herein referred to was published, and a notice of which true copy is hereto attached was published in a regular and entire edition of said Chandler News, and not in a supplement thereof, fo-r consecutive weeks, the first publication being on the 23 day of July 1903 and the last on the 13 day of August 1903.

(Signed) J. THOS. MELTON.

Sworn to before me and subscribed in my presence this 17 day of Aug. 1903.

[SEAL.] (Signed) T. A. NEAL, *Clerk,*
By D. J. NORTON, *Dept.*

Statement.

To The Chandler News, Dr.,

For the publication of the above named notice..... $33.7%

54 *Notice for Publication.*

In the District Court in and for the County of Lincoln and Territory of Oklahoma.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT and HARRY M. BENNETT, a Minor under the Age of 14, and by His Next Friend, Guardian, and Father, A. W. BENNETT, Defendants.

Notice of Publication to Obtain Service.

The defendants A. W. Bennett and Harry M. Bennett a minor under the age of 14, and by his next friend, guardian and father A. W. Bennett in the above entitled cause, will take notice that the plaintiff Sarah Grace Bennett has brought an action in the district court in Lincoln County, Oklahoma Territory, against the defendant A. W. Bennett to be decreed a divorce from him, and to recover alimony in the care, custody and control of their minor child James Richard Bennett, and that plaintiff be decreed lots 19 and 20 in block 28 in Bennetts Addition to the town of Chandler in the county of Lincoln, Oklahoma Territory the same being the homestead of plaintiff and defendant.

And also against the defendants A. W. Bennett and Harry M. Bennett a minor under the age of 14 and by his next friend, guardian and father A. W. Bennett asking that the warranty deed bearing date of May 20th, 1903 made by A. W. Bennett to Harry M. Bennett a minor conveying the following described property to-wit The North East quarter of section fifteen (15) in township fifteen (15) north of range two (2) East of the Indian Meridian; The N. E. ¼ of sec. 19, in township 16 north of range two (2) east of I. M., lot No. One (1) in section thirty-one (31) township 15 north of range two (2) East of I. M. Lot No. Four (4) in section thirty (30) in township fifteen (15) north of range two east of I. M., The south-east quarter of the north-east quarter of section thirty three (33) in township fourteen (14) north of range four east of the I. M., the west half of the north east quarter of section 33 in township 15
55 north of range four (4) east of the I. M., the north east one fourth of the north west quarter of section ten (10) in township fourteen (14) north of range four east of the I. M., except certain lots and tracts of said land heretofore deeded: A tract of land in the northeast corner of the southeast one fourth of the northwest quarter of section ten (10) in township fourteen (14) north of range four east of the I. M. in nearly a square form and containing twelve acres more or less. All the above real estate located in the

county of Lincoln in the Territory of Oklahoma. Lots 13, 14, 15, 16, 17, and 18, in Block No. 19, in East Chandler also all the following described real property situated in East Chandler, Lincoln County, Territory of Oklahoma, to-wit: All of blocks number one, four, ten and sixteen. Lots 13, to 18 inclusive in block number two (2) Lots numbered 19 to 24 inclusive in block number three (3) lots one to twelve inclusive in block six (6) lots thirteen to twenty four inclusive in block seven lots one to twelve inclusive in block eight. Lots seven to fifteen inclusive in block nine. Lots one to four inclusive in block eleven. Lots nineteen to twenty four inclusive in block eleven. West half of lots thirteen to eighteen inclusive in block twelve, lots one to six inclusive in block fifteen. Lots one and two in block eighteen. Lots seven and eight in block twenty one. Lots one to six inclusive in block twenty six. Lots one to six inclusive in block eight of Park Heights addition to Chandler. Lots seven and eight in block seventy seven in the city of Chandler. Lots twenty five and twenty six in block nine in Alleys Addition to the town of Stroud, lots twenty three and twenty four and one to six inclusive in block twenty seven, city of Chandler, Lincoln County. Lots number seven, eight, and nine in block eighteen, East Chandler, lots thirteen to eighteen inclusive in block twenty eight and lots twenty one to twenty four inclusive in block twenty eight in East Chandler, Lincoln County, Oklahoma, be set aside and subjected to the payment of plaintiff's alimony and that any judgment that she may obtain as permanent alimony be declared a lien on the above described real estate and the same be sold to satisfy the judgment for alimony.

56 Now therefore, if the defendants A. W. Bennett and Harry M. Bennett a minor under the age of 14 and by his next friend, guardian and father A. W. Bennett fail to appear and answer plaintiffs petition on or before the 4th day of September A. D. 1903, said petition will be taken as true as against the defendants and judgment rendered in favor of the plaintiff and against the defendant A. W. Bennett decreeing her a divorce and alimony the care, custody and control of their minor child James Richards Bennett and decreeing to plaintiff lots 19 and 20 in block 28 in Bennetts addition to the town of Chandler, the same being the homestead of the plaintiff and obtain a judgment against A. W. Bennett and Harry Bennett setting aside the deed above mentioned and that any judgment that she may obtain as permanent alimony be declared a lien on said real estate above described and the same be sold to satisfy the judgment for alimony as asked for in plaintiff- petition.

SARAH GRACE BENNETT, *Plaintiff.*

Witness my hand and the seal of said court hereto affixed this 22 day of July A. D. 1903.

T. A. NEAL,
Clerk of the District Court.
By E. L. BULLARD, *Deputy.*

[SEAL.]

DECKER AND WAGONER,
Att'ys for Plaintiff.

7-23-8-13.

57 District Court Journal 9, Page 209.

District Court of Lincoln County, O. T., September 19", 1903, 9" Judicial Day of the September, 1903, Term.

SARAH GRACE BENNETT
vs.
A. W. BENNETT ET AL.

Ordered by the court that C. B. Wilson, sr., be, and he is hereby appointed guardian *ad litem* for the minor defendant herein.

District Court Journal 9, Page 209.

District Court of Lincoln County, O. T., September 19", 1903, 9" Judicial Day of the September, 1903, Term.

SARAH GRACE BENNETT
vs.
A. W. BENNETT ET AL.

Ordered by the Court that C. B. Wilson, sr., guardian *ad litem* for the minor defendant herein be, and he is hereby required to file an answer for said minor defendant within five days from this date.

District Court Journal 9, Page 256.

District Court of Lincoln County, O. T., September 24th, 1903, 13th Judicial Day, September, 1903, Term.

SARAH GRACE BENNETT
vs.
A. W. BENNETT ET AL.

Comes now the plaintiff and defendant, A. W. Bennett, by their respective counsel, and said defendant submits a motion to set aside service of summons herein, and the court being fully advised: It is by the court ordered — be given leave to amend return on said summons.

58 District Court Journal 9, Page 257.

District Court of Lincoln County, O. T., September 24, 1903, 13th Judicial Day, September, 1903, Term.

SARAH GRACE BENNETT
vs.
A. W. BENNETT ET AL.

Ordered that ten days additional be given from this date to guardian *ad litem* to file an answer for the minor defendant herein.

TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

In the District Court within and for said County and Territory, September Term, 1903.

SARAH GRACE BENNETT, Plaintiff,

vs.

A. W. BENNETT and HARRY M. BENNETT, by His Next Friend and Guardian, A. W. BENNETT, His Father, Defendants.

Guardian ad Litem's Answer.

Now comes Harry M. Bennett, minor, by Chas. B. Wilson, his guardian *ad litem*, and for his answer to plaintiff's amended petition, says: that he denies each and every allegation contained in said petition.

HARRY M. BENNETT,
By CHARLES B. WILSON,
Guardian ad Litem.

(Endorsements on the back:) 1455 En. Sarah Grace Bennett *vs.* A. W. Bennett and Harry M. Bennett.—Answer of Guardian *ad litem.* Filed Lincoln County, O. T. Sep. 30 1903. T. A. Neal, Clerk, by D. J. Norton, Deputy.

59 *Summons.*

UNITED STATES OF AMERICA.

TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

In the District Court within and for Lincoln County, Oklahoma Territory, First Judicial District, at the Court House in Chandler.

The Territory of Oklahoma to the sheriff of Lincoln county, in said Territory, Greeting:

You are hereby commanded to notify the defendant A. W. Bennett that he has been sued by the plaintiff Sarah Grace Bennett in the District Court, sitting in and for said county of Lincoln, and that unless he answer by the 12 day of March A. D. 1904 the petition of the said plaintiff against said defendant, filed in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 20 day of Feb. A. D. 1904.

Witness my hand and Seal of said Court affixed at my office in Chandler, Lincoln County, Oklahoma Territory this 17 day of Feb. A. D. 1904.

[SEAL.]

T. A. NEAL,
Clerk of the District Court,
By D. J. NORTON, *Deputy.*

TERRITORY OF OKLAHOMA, *County of Lincoln, ss:*

Received this writ Feb. 17, 1904, and, as commanded therein, I summoned the following persons of the defendants within named at the times following, to-wit:

A. W. Bennett, Feb. 18, 1904, by delivering to said defendant personally in said county, a true and certified copy of the within summons with all endorsements thereon.

WM. TILGHMAN, *Sheriff,*
By WM. H. CRUME, *Deputy.*

Service and return, first person	$ .50
1 copy	.25
Total	$ .75

60 (Endorsements:) Alias Summons. No. 1455 Ent. District Court, Lincoln County. Oklahoma Territory. Sarah Grace Bennett *vs.* A. W. Bennett. Issued Feb. 17, 1904. Returnable Feb. 20, 1904. Ans. due March 12, 1904. Decker & Wagoner, Attorneys for plaintiff. Filed. Lincoln County, O. T. Feb. 18, 1904, T. A. Neal, Clerk, By D. J. Norton, Deputy.

Suit brought for alimony and divorce granted in favor of plaintiff and against the defendant.

If the defendant fails to answer, judgment will be taken for the sum of $— with interest at the rate of — per cent. per annum, payable annually from the — day of —— 190– $—— Attorney's fee and cost of suit. T. A. Neal, Clerk of District Court, by D. J. Norton, Deputy.

Court Journal 9, page 420.

District Court of Lincoln County, O. T., April 4", 1904, First Judicial Day of the April Term, 1904.

Court convened April 4", 1904, at 1.30 P. M. pursuant to an order of the Supreme Court of Oklahoma Territory. Officers present: The Honorable John H. Burford, the judge presiding, T. A. Neal, Clerk, by Wm. R. Benham, Deputy; E. A. Foster, county attorney; Wm. Tilghman, sheriff; T. A. Higgins, stenographer; and L. D. Muxlow, court crier.

Public proclamation being ordered by the court and announced by the crier for the opening of the court, the following business was done, to-wit:

61 In the District Court of Lincoln County, Okla. Territory.

No. 1455.

SARAH GRACE BENNETT, Plaintiff,
vs.
ALBERT W. BENNETT and HARRY M. BENNETT, by His Next Friend and Guardian, A. W. BENNETT, His Father, Defendants.

Now on this sixth day of April, A. D. 1904, the same being one of the regular court days of the April term of the District Court within and for the county of Lincoln and the Territory of Oklahoma, the plaintiff appearing by her attorneys and the defendant Albert W. Bennett appearing by his attorneys, this motion comes up for hearing on the motion of Albert W. Bennett, who appears specially by his attorneys, for the purpose of this motion only, and for no other purpose, to set aside the service of the summons in this case for the reason that the same is false and untrue; to set aside the service of the alias summons herein for the reason that the same was procured by fraud on the part of the plaintiff; and to have the court declare the notice of publication in this case of no force and effect so far as the same might affect the personal rights of the defendant, Albert W. Bennett, for the reason that the said notice of publication is not the proper method of serving this defendant with notice of the filing of the amended petition, which motion was by the court overruled, to which ruling of the court the defendant excepted.

Whereupon the defendant, Albert W. Bennett, by his attorneys, offered to file his answer in this cause, instanter, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court, heretofore made, to pay to the plaintiff in this cause the sum of one-thousand dollars as and for temporary alimony and one-hundred dollars as attorney's fees in this case, but made the further order that the said defendant
62 should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order within that time; to which order of the court the defendant, Albert W. Bennett, excepted at the time.

JNO. H. BURFORD, *Judge.*

Endorsed: Filed Lincoln County, O. T., Apr. 8, 1904. T. A. Neal, Clerk, by D. J. Norton, Deputy.

District Court Journal 9, Page 472.

District Court of Lincoln County, O. T., April 6th, 1904, 3" Judicial Day of the April Term, 1904.

SARAH GRACE BENNETT
vs.
A. W. BENNETT.

Comes now the plaintiff and defendant by respective counsel, and the defendant submits a motion to set aside the service of the summons herein, and the court being fully advised: It is by the court ordered that said motion be, and the same is hereby overruled. To which ruling of the court the defendant duly excepts and now the defendant asks leave to file his answer herein, and it is by the court ordered that the said request be granted upon condition that said defendant comply with former order of the court requiring said defendant to pay temporary alimony and attorney's fees, within five days from this date. To which ruling and order of the court the defendant duly excepts.

63 District Court Journal 10, Page 11.

District Court of Lincoln County, O. T., April 20th, 1904, 14th Judicial Day of the April Term, 1904.

SARAH GRACE BENNETT
vs.
A. W. BENNETT.

Ordered that this cause be set for trial April 28th, 1904.

District Court Journal No. 10, Page 120.

In the District Court of Lincoln County, Oklahoma.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT and HARRY M. BENNETT, a Minor, by His Next Friend and Guardian, A. W. BENNETT, Defendants.

Journal Entry.

Now to-wit on this the 29th day of April, 1904, the same being one of the regular judicial days of the regular April, 1904, term of the District Court of Lincoln County, Oklahoma Territory, the above entitled cause came on for hearing and final determination on the regular assignment of causes. And the court finds that the plaintiff, Sarah Grace Bennett, filed in said court on the 21st day of May, 1903, her petition asking for a decree of court dissolving the marital

relations existing between plaintiff and defendant, A. W. Bennett, and also for $1000.00 temporary alimony to assist her in carrying on this suit and as support for herself and minor child, James Richard Bennett, and the further sum of $500.00 as attorney fees for her attorneys and a just division of defendant's real and personal estate as permanent alimony and that the conveyance made by defendant, A. W. Bennett, to his son, Harry M. Bennett, minor, be declared as not affecting any right that plaintiff has in the property conveyed by the defendant and for the care, custody and control of the child, James Richard Bennett.

64 The court further finds that the defendant, A. W. Bennett, was duly and legally served, personally, with summons in said action by leaving a certified copy of said summons at his usual place of residence in Lincoln County, Oklahoma, as shown by the return of the sheriff of Lincoln County endorsed thereon.

The court further finds that the defendant, A. W. Bennett, has failed and refused to comply with an order made by the court on the 23d day of May, 1903, wherein the said A. W. Bennett was ordered and adjudged to pay to the plaintiff within ten days from said date, $1000.00 for the use and benefit of plaintiff, as and for temporary alimony and suit money and the further sum of $100.00, as and for payment of plaintiff's attorney fees.

The court further finds that said order was served on the defendant, A. W. Bennett by the sheriff of Lincoln County, Oklahoma.

The court further finds that the plaintiff, on the 21st day of July, her petition not having been plead to, filed in said court an amended petition for divorce on the same grounds and for alimony and in addition thereto asks that certain real estate, described in her petition, be awarded to her, being lots nineteen and twenty in block 28 in East Chandler, Lincoln County, Oklahoma Territory, the same being the homestead of plaintiff and defendant. And further that certain real estate described in plaintiff's petition which was at the commencement of plaintiff's action transferred by A. W. Bennett by deed to Harry M. Bennett the son of defendant, a minor under the age of fourteen years and a resident of the State of Virgina, be set aside and subjected to the payment of plaintiff's alimony and that Harry M. Bennett, minor under the age of fourteen years was by his next friend, guardian and father, A. W. Bennett, made a party defendant in said action.

The court further finds that the defendant, Harry M. Bennett, a minor, on and after the filing of plaintiff's amended petition herein, has been duly and legally served by publication by the plaintiff and that said action is one of the cases in which service by publication is authorized by law.

65 That heretofore to-wit on the 19th day of September, 1903, the same being a regular judicial day of this court, all other persons failing to apply, Chas. B. Wilson, Jr., one of the attorneys for A. W. Bennett and as a friend of Harry M. Bennett, minor, moves the court to appoint a guardian *ad litem* for Harry M. Bennett, minor defendant, that Chas. B. Wilson, Sr., a member of the bar of said Lincoln County and an attorney at law, authorized to practice

in all courts of record of said territory, a disinterested and capable person, was by the court appointed as guardian *ad litem* for the said minor defendant, Harry M. Bennett. And thereafter and on the 30th day of September, 1903, the said minor defendant, Harry M. Bennett, by and through his guardian *ad litem*, Chas. B. Wilson, Sr., appeared and answered herein as provided by law.

The court further finds that after the filing of plaintiff's amended petition the defendant, A. W. Bennett was duly and legally served, personally, with an alias summons in said cause as shown by the return of the sheriff of Lincoln County, Oklahoma Territory endorsed thereon.

The court further finds that on the fifth day of April, 1904, the defendant, A. W. Bennett appeared by his attorneys and asked leave to file his answer herein out of time, which request was objected to by the plaintiff for the reason that the said defendant had failed to comply with an order theretofore made to pay to the clerk of the court for the use of the plaintiff, the sum of one thousand dollars as and for temporary alimony and the further sum of one hundred dollars as and for attorney fees for her attorneys, and the court being advised that the defendant had not complied with said order or offered any excuse for his failure so — do, his application for leave to answer is refused until he shall comply with said former order or show cause why he has not, and he is given five days to make said showing and in which to file his said answer.

66 And this cause coming on for trial now on this 29th day of April, 1904, the plaintiff appears in person and by her attorneys, S. D. Decker and Fred A. Wagoner, and the minor defendant, Harry M. Bennett appears by his guardian *ad litem*, Chas. B. Wilson, Sr., and by his counsel Chas. B. Wilson, Sr., and the defendant, A. W. Bennett, having failed to comply with the former order of the court or make excuse for not complying and having failed to answer the petition of plaintiff herein the said defendant, A. W. Bennett, is now called three times in open court but makes default and fails to plead or otherwise appear in said cause and the said A. W. Bennett is by the court adjudged to be in default for an answer and not entitled to answer or plead until he shall comply with the order heretofore made wherein the said A. W. Bennett was ordered by the court to pay to the plaintiff $1000.00 temporary alimony and $100.00 attorney fees for her attorneys. The plaintiff, Sarah Grace Bennett, and the defendant, Harry M. Bennett by his guardian *ad litem*, announces ready for trial, jury waived and by agreement said cause is tried to the court.

The plaintiff introduces her evidence and rests, the defendant, Harry M. Bennett, minor, by his guardian *ad litem* and his attorney, Chas. B. Wilson, Sr., introduces no evidence and rests, and the said cause is submitted to the court.

The court being fully advised and satisfied in the premises after hearing the evidence finds that the allegations and averments contained and alleged in plaintiff's petition and amended petition are true and the court therefore finds the issues for the plaintiff.

The court further finds that the plaintiff, Sarah Grace Bennett

is entitled to a decree dissolving the marriage relations existing between plaintiff and defendant.

The court further finds that the plaintiff is entitled to have the care and custody of the child, James Richard Bennett.

The court further finds that the plaintiff is entitled to have and recover of and from the defendant, A. W. Bennett, the sum
67 of $6000.00 and lots 19 and 20 in block 28, the same being the homestead of plaintiff and defendant, as permanent alimony and that she recover the further sum of $500.00 as and for the payment of plaintiff's attorney fees and the costs of this suit.

The court further finds that the warranty deed made by A. W. Bennett to Harry M. Bennett, dated the 20th day of May, A. D. 1903, conveying the following described real estate, situated in the county of Lincoln, Territory of Oklahoma, to-wit; the northeast quarter (¼) of section fifteen (15) in township fifteen (15) north of range two (2) east of the Indian Meridian; the northeast quarter of section nineteen (19) in township sixteen (16) north of range two (2), east of the Indian Meridian lot number one in section thirty-one (31) township fifteen (15) north of range two (2), east of the Indian Meridian; lot numbered four (4) in section thirty (30) in township fifteen (15), north of range two (2) east of the Indian Meridian; the southeast quarter (¼) of the northeast quarter of section thirty three (33) in township fourteen (14) north of range four (4), east of the Indian Meridian; the west half of the northeast quarter (¼) of section thirty three (33) in township fourteen (14), north of range four (4), east of the Indian Meridian; the northeast one fourth (¼) of the northwest quarter (¼) of section ten (10) in township fourteen (14), north of range four (4), East of the Indian Meridian, except certain lots and tracts of said land heretofore deeded; a tract of land in the northeast corner of the southeast one-fourth of the northwest quarter (¼) of section ten (10) in township fourteen (14) north of range four (4), east of the Indian Meridian in nearly a square form and containing twelve (12) acres more or less the same being all my right, title and interest in and to said forty (40) acre tract of land; lots thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18) in block numbered nineteen (19) in East Chandler, also all the following described real property situated in East Chadler, Lincoln
68 County, Territory of Oklahoma, to-wit: All of blocks numbered one (1), four (4) ten (10) and sixteen (16), lots thirteen (13) to eighteen (18) inclusive in block numbered two (2); Lots numbered nineteen (19) to twenty four (24) inclusive in block six (6); lots thirteen (13) to twenty four (24) inclusive in block seven (7); lots one (1) to twelve (12) inclusive in block eight (8); lots seven (7) to fifteen (15) inclusive in block (9); lots one (1) to four (4) inclusive in block eleven (11); lots nineteen (19) to twenty four (24), inclusive in block eleven (11) west half of lots thirteen (13) to eighteen (18) inclusive in block twelve (12); lots one (1) to six (6) inclusive in block fifteen (15); lots one (1) and two (2) in block eighteen (18); lots seven (7) and eight (8) in block twenty one (21); lots one (1) to six (6) inclusive in block

twenty six (26); lots one (1) to six (6) inclusive in block eight (8) of Park Heights Addition to Chandler; lots seven (7) and eight (8) in block seventy-seven (77) in the city of Chandler; lots twenty five (25) and twenty six (26) in block nine (9) in Alleys Addition to the town of Stroud; lots twenty three and twenty four (24) and one (1) to six (6) inclusive in block twenty seven (27) City of Chandler, Lincoln County; lots number seven (7), eight (8) and nine (9) in block eighteen (18), East Chandler; lots thirteen (13) to eighteen (18) inclusive and lots twenty one (21) to twenty four (24) inclusive in block twenty eight (28), in East Chandler; Lincoln County, Oklahoma is by the court found to be without consideration, fraudulent and void as affecting the rights of plaintiff and that the same should be set aside and held for naught and the property therein mentioned and above described is subject to the payment of the $6000.00 alimony and $500.00 attorney fees and the costs of this suit.

It is therefore considered, ordered and adjudged by the court that the bonds of matrimony heretofore existing between the plaintiff, Sarah Grace Bennett and the defendant A. W. Bennett be dissolved and that all the duties, rights and obligations accruing to the plaintiff and the defendant by reason of said marriage shall cease
69 and determine; and that said divorce shall not become absolute until the expiration of six months from the date of this decree.

And it is further ordered, adjudged and decreed by the court that the plaintiff shall have the care and custody of the minor child, James Richard Bennett.

It is further considered, ordered, adjudged and decreed by the court that the warranty deed made and executed by A. W. Bennett to his son, Harry M. Bennett, dated May 20th, 1903, as described and set out in plaintiff's petition is hereby declared and decreed to be without consideration fraudulent and void as affecting the rights of the plaintiff, Sarah Grace Bennett, that the said deed be and the same is hereby set aside and held for naught and the property therein mentioned and hereinafter described or so much thereof as is necessary to satisfy the plaintiff's judgment herein mentioned for $6000.00 as alimony for herself and $500.00 as her attorney fees for her attorneys, S. D. Decker and Fred A. Wagoner, and costs of this suit. And that said judgment is hereby decreed to be a lien on the following described real estate, to-wit: the northeast quarter (¼) of section fifteen (15) in township fifteen (15) north of range two (2) east of the Indian Meridian; the northeast quarter (¼) of section nineteen (19) in township sixteen (16) north of range two (2) east of the Indian Meridian; lot number one (1) in section thirty one (31) in township fifteen (15) north of range two (2) east of the Indian Meridian; lot numberd four (4) in section thirty (30) in township fifteen (15) north of range two (2) east of the Indian Meridian; the southeast quarter (¼) of the northeast quarter (¼) of section thirty three (33) in township fourteen (14) north of range four (4) east of the Indian Meridian; the west half of the northeast quarter (¼) of section thirty three (33) in township fourteen (14) north of range

four (4) east of the Indian Meridian; the northeast one fourth (¼) [illegible] of section ten (10) in township
of the northwest quarter (¼) of section ten (10) in township
70 fourteen (14) north of range four (4) east of the Indian Meridian, except certain lots and tracts of land heretofore deeded; a tract of land in the northeast corner of the southeast one fourth (¼) of the northwest quarter (¼) of section ten (10) in township fourteen (14) north of range four (4) east of the Indian Meridian in nearly a square form and containing twelve (12) acres more or less, the same being all my right, title and interest in and to said forty (40) acre tract of land; lots thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17) and eighteen (18) in block nineteen (19) in East Chandler, also all the following described real property situated in East Chandler, Lincoln County, Territory of Oklahoma, to-wit: all of blocks numbered one (1), four (4), ten (10) and sixteen (16); lots thirteen (13) to eighteen (18) inclusive in block numbered two (2); lots numbered nineteen (19) to twenty four (24) inclusive in block numbered three (3); lots one (1) to twelve (12) inclusive in block six (6); lots thirteen (13) to twenty four (24) inclusive in block seven (7); lots one (1) to twelve (12) inclusive in block eight (8); lots seven (7) to fifteen (15) inclusive in block nine (9); lots one (1) to four (4) inclusive in block eleven (11); lots nineteen (19) to twenty four (24) inclusive in block eleven (11); west half of lots thirteen (13) to eighteen (18) inclusive in block twelve (12); lots one (1) to six (6) inclusive in block fifteen (15); lots one (1) and two (2) in block eighteen (18); lots seven (7) and eight (8) in block twenty one (21); lots one (1) to six (6) inclusive in block twenty six (26); lots one to six (6) inclusive in block eight (8) of Park Heights Addition to Chandler; lots seven (7) and eight (8) in block seventy seven (77) in the city of Chandler; lots twenty five (25) and twenty six (26) in block nine (9) in Alleys Addition to the town of Stroud; lots twenty three (23) and twenty four (24) and one (1) to six (6) inclusive in block twenty seven (27) City of Chandler, Lincoln County; lots numbered seven (7) eight (8) and nine (9) in block eighteen (18) East Chandler; lots thirteen (13) to eighteen
71 (18) inclusive and lots twenty one (21) to twenty four (24) inclusive in block twenty eight (28) in East Chandler, Lincoln County, Oklahoma. And that the same be and is hereby subjected to the payment of said judgment for alimony, attorney fees and costs of suit and that execution issue thereon.

And it is further ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant, A. W. Bennett the sum of $6000.00 as permanent alimony and in addition to the $6000.00 as alimony, is hereby ordered, adjudged and decreed that the plaintiff, Sarah Grace Bennett be and she is hereby awarded in fee lots 19 and 20 in block 28 in East Chandler, Lincoln County, Oklahoma Territory, as her sole and separate property, and the title to said lots 19 and 20 in block 28 in East Chandler, Lincoln County, Oklahoma is hereby vested in fee simple in the said Sarah Grace Bennett, free all demands, interests or claims of the said A. W. Bennett as fully and to the same effect as if the said A. W. Bennett

had conveyed to the said Sarah Grace Bennett by warranty deed the said lots 19 and 20, in block 28 in East Chandler, Lincoln County, the said lots 19 and 20, in block 28 in East Chandler, Lincoln County, Oklahoma Territory with all hereditaments and appurtenances thereunto belonging. And that in addition thereto the plaintiff, Sarah Grace Bennett do have and recover of and from the said defendant, A. W. Bennett the sum of $500.00 as attorney fees as and for her attorneys, S. D. Decker and Fred A. Wagoner and the costs of this suit herein taxed at $—.

It is further ordered by the court that the order heretofore made for the sum of $1000.00 as temporary alimony for plaintiff and $100.00 as and for her attorney fees is hereby vacated and set aside.

It is further ordered by the court that Chas. B. Wilson, Sr., be and he is hereby allowed the sum of one hundred dollars for his services as guardian *ad litem* for the minor defendant, Harry M. Bennett, the same to be taxed as costs in this case and collected as other costs are collected in this cause.

72 This decree shall not become absolute for six months from this date.

JNO. H. BURFORD, *Judge.*

District Court Journal 10, Page 117.

District Court of Lincoln County, O. T., April 29", 1904, 22" Judicial Day of the April Term, 1904.

SARAH GRACE BENNETT
vs.
A. W. BENNETT ET AL.

Ordered by the court that Chas. B. Wilson, Sr., be, and he is hereby allowed the sum of $100.00 for his services as guardian *ad litem* for the minor defendant, H. M. Bennett.

District Court Journal 10, Page 115.

District Court of Lincoln County, O. T., April 29th, 1904, 22" Judicial Day of the April Term, 1904.

SARAH GRACE BENNETT
vs.
A. W. BENNETT ET AL.

Comes now the plaintiff by Decker and Wagoner, her attorneys, and comes the minor defendant, Harry Bennett, by C. B. Wilson, Sr., guardian *ad litem*, and the said minor defendant submits a motion for a new trial, and the court being fully advised, it is by the court ordered that said be and the same is hereby overruled. To which ruling of the court said minor defendant excepts.

Whereupon said minor defendant makes application for time in which to make and serve a case made for the supreme court. It is therefore considered, ordered and adjudged by the court that said

defendant be given ninety days within which to make and
73 serve a case made for the supreme court, and plaintiff is given ten (10) days thereafter to suggest amendments thereto, and said case made to be settled and signed upon five days' notice by either party to the other.

TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

In the District Court Within and for said County and Territory.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT and HARRY M. BENNETT, a minor, by His Next Friend and Guardian, A. W. BENNETT, His Father, Defendants.

Now on this 26th day of July, 1904, the above entitled cause comes on for hearing before Hon. Jno. H. Burford, judge of the district court of Lincoln County, Oklahoma Territory, at chambers in Guthrie, Logan County, Oklahoma Territory, on the application of the defendant, Harry M. Bennett, by his guardian *ad litem*, Charles B. Wilson, for an extension of time of thirty days in which to make and serve a case made in said cause, and the court being advised in the premises, it is therefore considered, ordered and adjudged by the judge in chambers in the said city of Guthrie, Oklahoma, that the said defendant be given an extension of time of thirty days in which to make and serve a case made for the supreme court, and the plaintiff is given ten days thereafter to suggest amendments thereto and said case made to be settled and signed upon five days' notice by either party to the other.

JNO. H. BURFORD, *Judge.*

74 TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

In the District Court Within and for said County and Territory.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT and HARRY M. BENNETT, a minor, by His Next Friend and Guardian, A. W. BENNETT, His Father, Defendants.

I, T. A. Neal, clerk of the district court within and for the county of Lincoln and the Territory of Oklahoma, do hereby certify that the foregoing is a true, correct and complete transcript of the record of the above entitled cause as the same appears of record in the office of the clerk of the district court of said Lincoln County, Oklahoma Territory, and that said transcript contains true, correct and complete copies of all the pleadings, processes, returns, orders and judgments in said cause of record in the office of the said clerk of the district court in said county and Territory.

In witness whereof, I have hereunto set my hand and affixed the seal of said court on this 23 day of August, A. D. 1904.

T. A. NEAL,
Clerk of the District Court,
By D. J. NORTON,
Deputy Clerk.

[SEAL.]

Filed Aug. 26, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

75 EXHIBIT B.

TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

In the District Court Within and for said County and Territory.

Filed Aug. 26, 1904. Benj. F. Hegler, Clerk Supreme Court, by Thos. A. Higgins, Deputy.

SARAH GRACE BENNETT, Plaintiff,
vs.
ALBERT W. BENNETT and HARRY M. BENNETT, a Minor, by His Next Friend and Guardian, A. W. BENNETT, His Father, Defendants.

Notice of Appeal.

Notice is hereby given by the defendant, Albert W. Bennett, that it is his intention to appeal from the decree of the court in the above entitled cause of action, granting the plaintiff, Sarah Grace Bennett, a divorce from this defendant and decreeing her, the said plaintiff, alimony and suit money and the costs of the suit against this defendant.

ALBERT W. BENNETT,
By CHAS. B. WILSON, JR.,
EMERY A. FOSTER, AND
SPINK & SPINK,
His Attorneys.

Endorsements: Filed, Lincoln County, O. T., April 30, 1904. T. A. Neal, clerk, by D. J. Norton, Deputy.

TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

I, T. A. Neal, clerk of the district court within and for the said county and Territory, do hereby certify that the above and foregoing is a true and correct copy of the notice of appeal in the therein entitled cause, now on file and of record in my office of the clerk of the district court in Chandler, Lincoln County, Oklahoma, and that said notice of appeal was filed for record in said clerk's office on the 30th day of April, 1904.

Witness my hand and the seal of the court on this 24th days of August, 1904.

[SEAL.] T. A. NEAL, *Clerk*,
By D. J. NORTON, *Deputy*.

Filed Aug. 26, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By THOS. A. HIGGINS, *Deputy*.

76 Case made is endorsed on the back as follows, to wit: No. 1587. A. W. Bennett *vs.* Sarah Grace Bennett. Petition in error. Filed Aug. 26, 1904. Benj. F. Hegler, Clerk Supreme Court, by Thos. A. Higgins, Deputy. Wilson & Wilson, and Emery A. Foster, Att'ys.

77 And afterward at the January 1905, Term of said Supreme Court, on the Seventh day of June, 1905, the following proceeding was had in said cause to wit:

1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

And now oral argument is waived in this cause, and leave is given for supplemental briefs and authorities, and cause is submitted.

78 And afterward, at the June Term, 1905, on the Seventh day of September, 1905, the following proceeding was had in said cause, to wit:

1587.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

And now this cause comes on for final decision and determination by the Court upon the record and briefs submitted therein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Gillette, J. All the Justices concurring except Burford, C. J., who tried the cause in the court below, not sitting.

Which opinion reads in words and figures as follows, to wit:

79 No. 1587.

In the Supreme Court of the Territory of Oklahoma, June Term, 1905.

Filed Sept. 7, 1905.

A. W. BENNETT, Plaintiff in Error,
vs.
SARAH GRACE BENNETT, Defendant in Error.

Syllabus.

Divorce.—Alimony—Default—Judgment. Where in an action for divorce and alimony the court upon proper showing orders the payment of temporary alimony, *pendente lite*, which is by the defendant ignored and a compliance therewith refused, and where the defendant, in default for answer or appearance, comes into court on the day said cause is set for trial asking leave to appear and defend the action upon its merits, without presenting his answer or showing any cause or reason why he has disobeyed the order of the court with reference to the payment of temporary alimony, the court grants the leave asked for, conditioned upon his compliance in seven days' time with such order for alimony, and he thereupon refuses to accept the leave granted upon such terms, and he does not show or offer to show his inability to comply therewith, and said cause is thereupon tried as upon default, no error is committed by the trial court.

Error from the District Court of Lincoln County.

Jno. H. Burford, Trial Judge.

Affirmed.

Chas. B. Wilson, Jr., and Emory A. Foster, for plaintiff in error.
S. D. Decker, Fred A. Wagoner, Roy V. Hoffman, and John Embry, for defendant in error.

Statement of Facts.

This is an action for divorce and alimony commenced in the District Court of Lincoln County, the petition therein being filed on the 21st day of May, 1903.

The petition alleges cruelty of a gross and aggravated character as the ground for divorce, and sets out a large list of property possessed by defendant, A. W. Bennett, valued at $40,000.00 or more, and prays for a divorce and for alimony, and for the custody of the infant child of the parties. At the time of filing the petition the parties resided in the city of Chandler, in said county, and the process

of the court was issued and served on the defendant, as shown
80 by the sheriff's return, by leaving a certified copy thereof at defendant's last place of residence on the 22nd day of May, 1903, being the day following the filing of the petition. The record also shows that at the time of filing the petition (May 21) an application for temporary alimony and a restraining order was also filed, and on the same day a copy of this application and notice of presenting the same to the judge of said court for an order therein, was personally served upon the defendant.

The application, notice and service are as follows:

"Application for Temporary Alimony and Restraining Order.

"Comes now the plaintiff Sarah Grace Bennett, and alleges and says:

"That she is the plaintiff in the action brought for divorce and permanent alimony in said court against the defendant; that she has charged in her petition against the defendant extreme cruelty, and that defendant is the owner of real estate and personal property of the reasonable value of $40,000.00 as she has been informed by the defendant and believes, and that she has set forth in her petition as near as she can a description of his real and personal estate. That he has upon receiving information from plaintiff that she intended to commence proceedings against him for divorce and alimony made disposition of quite considerable of his real estate as shown by the record in said county, by having same conveyed to his son Harry M. Bennett, of the age of 11 years, who is his son by his first wife. And that said conveyance is without a valuable consideration, and was made for the purpose of defrauding your petitioner and applicant of her legal and equitable rights in said property. And that she asks that defendant be restrained from making any further disposition of any of his property, real or personal, in the Territory of Oklahoma, and that until this action has been finally tried, and plaintiffs rights in the premises passed on by the court. That defendant be ordered to pay into court for the plaintiff the sum of $1,000.00 temporary alimony to support her and to carry on her suit,
81 as she is unable on account of sickness and late confinement to do work of any kind or character. And that he also be ordered to pay into court for the support and maintenance of the child born to plaintiff and defendant the sum of $500.00 as temporary alimony, and the further sum of $500.00 for her attorneys; as she is unable and without means to pay counsel and carry on her suit. That the petition filed in said cause and affidavits will be presented to the court in support of this application.

DECKER & WAGONER,
Att'ys for Plaintiff."

"TERRITORY OF OKLAHOMA, *Lincoln County, ss:*

"Personally appeared before me a notary public Sarah Grace Bennett who being by me first duly sworn says: That she is the plaintiff in the above entitled cause, and she has read the above and

foregoing application, and the matters and things therein set forth are true.

[Certificate and Seal.]

SARAH GRACE BENNETT.

"Albert W. Bennett, defendant in the above entitled cause: You are hereby notified that the above and foregoing application will on the afternoon of Saturday May 23, 1903, be presented to the Honorable John H. Burford, Judge of said Court at Chambers in Stillwater, Payne County, Oklahoma Territory, to be acted on by him and the petition filed in said cause referred to in said application and affidavits in support of this application will also be presented to said judge at said time and place.

DECKER & WAGONER,
Att'ys for Plaintiff."

"*Affidavit.*

Victor S. Decker, being first duly sworn, says That on the 21 day of May A. D. 1903, as Agent for the plaintiff in the above entitled cause, that he went to the office of the defendant, Albert W. Bennett, and served an exact copy of the within application for temporary alimony and restraining order upon the said defendant, Albert W. Bennett, by offering to him an exact copy of said application for Temporary Alimony and informing him of the contents
82 thereof, which application the said defendant, Albert W. Bennett, refused to receive.

VICTOR S. DECKER.

Subscribed and sworn to before me this 21 day of May A. D. 1903.

[SEAL.] RAY McELHINNEY,
Notary Public.

My Comm. expires March 6th, 1906."

Application was made to the judge of said court at Chambers in accordance with the notice served on the defendant, and thereupon the following order was by him made:

"*Temporary Order for Alimony.*

" Now on this 23rd day of May, 1903, this cause comes on to be heard before Hon. Jno. H. Burford, Judge of the District Court of Lincoln County, Oklahoma Territory, in chambers, in the city of Stillwater, O. T., upon the application and motion of the plaintiff for an order granting this plaintiff temporary alimony, suit money and attorney fees; the plaintiff appeared by her attorneys Decker & Wagoner, and the defendant appeared not.

And the court being fully advised in the premises, from the petition of plaintiff, and the evidence adduced upon this hearing finds

that the plaintiff should be granted temporary alimony and suit money and attorney fees herein.

"And upon further consideration of said application and motion, the court finds that the defendant should be restrained from in any manner disposing of his personal property or any of his real estate, as prayed for in said motion and application.

It is therefore considered, ordered and adjudged that the defendant pay into the office of the clerk of the District Court of Lincoln County, Oklahoma, within ten days from this date, the sum of One Thousand Dollars, for the use and benefit of the plaintiff, as and for temporary alimony and suit money, and the further sum of one hundred dollars, as and for the payment of plaintiff's attorneys' fees.

It is further considered, ordered and adjudged that the defendant, Albert W. Bennett, be and he is hereby restrained and en-
83 joined from in any manner selling or disposing of or in any manner incumbering any of his real or personal property.

JOHN H. BURFORD,
Judge of the District Court of Lincoln County, O. T."

On the day before the filing of the petition (May 20, 1903), the defendant, A. W. Bennett, made and executed to his minor son by a former marriage a deed to a large amount of the real property then owned by him. The grantee in this deed was at that time eleven years of age, and living in the State of Virginia, and the consideration expressed in the deed was "love and affection and $1.00," and was filed for record in the office of the register of deeds of Lincoln County on the day of its execution.

Defendant absconded from said county and from the Territory of Oklahoma soon after the filing of plaintiff's petition, and so far as the record shows did not return to this Territory until the month of February, 1904.

On July 21, 1903, an amended petition was filed making Harry M. Bennett the said minor son of the defendant a party defendant, and adding a more full and complete list and description of defendant's property in this Territory, but not otherwise changing or enlarging the allegation of cause for divorce set out in the original petition. Service under this petition was obtained by publication.

No appearance in said cause having been entered on the 19th of Septe[illegible]er, 1903, the court being then in session appointed a guardian *ad litem* for the said minor defendant Harry M. Bennett, and ordered answer to be filed in his behalf within five days, and on September 30 the answer of said defendant was duly filed. On the 17th day of February, 1904, an alias summons was issued in said cause, and returned by the sheriff of said county personally served upon the defendant A. W. Bennett. The answer day in this summons was March 12, 1904. On April 6, 1904, the defendant A. W. Bennett appeared specially in said cause and filed the following motion:

"In the District Court of Lincoln County, Oklahoma Territory.

84 No. 1455.

"SARAH GRACE BENNETT, Plaintiff,
vs.
ALBERT W. BENNETT and HARRY M. BENNETT, by His Next Friend and Guardian, A. W. BENNETT, His Father, Defendants.

Now on this sixth day of April, A. D. 1904, the same being one of the regular court days of the April term of the District Court within and for the county of Lincoln and the Territory of Oklahoma, the plaintiff appearing by her attorneys, and the defendant Albert W. Bennett appearing by his attorneys, this motion comes up for hearing on the motion of Albert W. Bennett, who appears specially by his attorneys for the purpose of this motion only and for no other purpose, to set aside the service of the summons in this case for the reason the same is false and untrue; to set aside the service of the alias-summons herein for the reason the same was procured by fraud on the part of the plaintiff; and to have the court declare the notice of publication in this case of no force and effect so far as the same might affect the personal rights of the defendant, Albert W. Bennett, for the reason that the said notice of publication is not the proper method of serving this defendant with notice of the filing of the amended petition, which motion was by the court overruled, to which ruling of the court the defendant excepted.

Whereupon the defendant, Albert W. Bennett, by his attorneys, offered to file his answer in this cause, instanter, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court, heretofore made, to pay to the plaintiff in this cause the sum of one thousand dollars as and for temporary alimony and one hundred dollars as attorney's fees in this case, but made the further order that the said defendant should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order
85 within that time; to which order of the court the defendant, Albert W. Bennett, excepted at the time.

JNO. H. BURFORD, *Judge.*"

"District Court of Lincoln County, O. T., April 6th, 1904, 3" Judicial Day of the April Term, 1904.

"SARAH GRACE BENNETT
vs.
A. W. BENNETT.

District Court Journal.

"Comes now the plaintiff and defendant by respective counsel and the defendant submits a motion to set aside the service of the

summons herein, and the court being fully advised, it is by the court ordered that said motion be, and the same is hereby overruled. To which ruling of the court the defendant duly excepts; and now the defendant asks leave to file his answer herein, and it is by the court ordered that the said request be granted upon the condition that said defendant comply with the former order of the court requiring said defendant to pay temporary alimony and attorney's fees, within five days from this date. To which ruling and order of the court the defendant duly excepts."

On the 20th day of April, 1904, the cause was set for trial by order of the court on the 28th, of that month, and said cause came on for trial, and was duly heard by the court on the 29th day of April, at which time the court made the following findings, viz:

"In the District Court of Lincoln County, Oklahoma.

SARAH GRACE BENNETT, Plaintiff,
vs.
A. W. BENNETT and HARRY M. BENNETT, a Minor, by His Next Friend and Guardian, A. W. BENNETT, Defendants.

Journal Entry.

"Now to wit on this the 29th, day of April, 1904, the same being one of the regular judicial days of the regular April, 1904, term of District Court of Lincoln County, Oklahoma Territory, the above entitled cause came on for hearing and final determination on the regular assignment of causes. And the court finds that the plaintiff Sarah Grace Bennett, filed in said court on the 21st day of May, 1903, her petition asking for a decree of court dissolving the
86 marital relations existing between plaintiff and defendant, A. W. Bennett, and also for $1000.00 temporary alimony to assist her in carrying on this suit and as support for herself and minor child, James Richard Bennett, and the further sum of $500.00 as attorney's fees for her attorneys, and a just division of defendant's real and personal estate as permanent alimony, and that the conveyance made by defendant, A. W. Bennett, to his son, Harry M. Bennett, a minor, be declared as not affecting any right that plaintiff has in the property conveyed by the defendant, and for the care, custody and control of the child, James Richard Bennett.

"The court further finds that the defendant, A. W. Bennett, was duly and legally served, personally, with summons in said action by leaving a certified copy of said summons at his usual place of residence in Lincoln County, Oklahoma, as shown by the return of the sheriff of Lincoln County endorsed thereon.

"The court further finds that the defendant, A. W. Bennett has failed and refused to comply with an order made by the court on the 23rd day of May, 1903, wherein the said A. W. Bennett was ordered and adjudged to pay to the plaintiff within ten days from

said date, $1000.00 for the use and benefit of plaintiff, as and for temporary alimony and suit money, and the further sum of $100.00 as and for payment of plaintiff's attorney fees.

"The court further finds that said order was served on the defendant, A. W. Bennett by the sheriff of Lincoln County, Oklahoma.

"The court further finds that the plaintiff, on the 21st day of July, her petition not having been pleaded to, filed in said court an amended petition for divorce on the same grounds, and for alimony, and in addition thereto asks that certain real estate, described in her petition, be awarded to her, being lots nineteen and twenty in block 28 in East Chandler, Lincoln County, Oklahoma Territory, the same being the homestead of plaintiff and defendant. And further that certain real estate described in plaintiff's petition which was at the commencement of plaintiff's action transferred by A. W.
87 Bennett by deed to Harry M. Bennett, the son of the defendant, a minor under the age of fourteen years and a resident of the state of Virginia, be set aside and subjected to the payment of plaintiff's alimony, and that Harry M. Bennett, minor under the age of fourteen years was by his next friend, guardian and father, A. W. Bennett, made a party defendant in said action.

"The court further finds that the defendant, Harry M. Bennett, a minor, on and after the filing of plaintiff's amended petition herein, has been duly and legally served by publication by the plaintiff, and that said action is one of the cases in which service by publication is authorized by law.

"That heretofore to wit on the 19th day of September, 1903, the same being a regular judicial day of this court, all other persons failing to apply, Chas. B. Wilson, Jr., one of the attorneys for A. W. Bennett and as a friend of Harry M. Bennett, minor, moves the court to appoint a guardian *ad litem* for Harry M. Bennett, minor defendant, that Chas. B. Wilson, Sr., a member of the bar of said Lincoln County and an attorney at law, authorized to practice in all courts of record of said territory, a disinterested and capable person, was by the court appointed as guardian *ad litem* for the said minor defendant Harry M. Bennett, and thereafter, on the 30th day of September, 1903, the said minor defendant Harry M. Bennett by and through his guardian *ad litem*, Chas. B. Wilson, Sr., appeared and answered herein as provided by law.

"The court further finds that after the filing of plaintiff's amended petition the defendant, A. W. Bennett, was duly and legally served, personally, with an *alias* summons in said cause, as shown by the return of the sheriff of Lincoln County, Oklahoma Territory, endorsed thereon.

"The court further finds that on the fifth day of April, 1904, the defendant, A. W. Bennett, appeared by his attorneys, and asked leave to file his answer herein out of time, which request was objected to by the plaintiff for the reason that the said defendant had failed to comply with an order theretofore made to pay to the
88 clerk of the court for the use of the plaintiff, the sum of one thousand dollars as and for temporary alimony, and the fur-

ther sum of one hundred dollars as and for temporary fees for her attorneys, and the court being advised that the defendant had not complied with said order or offered any excuse for his failure to so do, his application for leave to answer is refused until he shall comply with said former order or show cause why he has not, and he is given five days to make said showing, and in which to file his said answer.

"And this cause coming on for trial now on this 29th day of April, 1904, the plaintiff appears in person and by her attorneys, S. D. Decker and Fred A. Wagoner, and the minor defendant, Harry M. Bennett appears by his guardian *ad litem*, Chas. B. Wilson, Sr., and by his counsel Chas. B. Wilson, Jr., and the defendant, A. W. Bennett, having failed to comply with the former order of the court or make excuse for not complying, and having failed to answer the petition of plaintiff herein, the said defendant, A. W. Bennett, is now called three times in open court, but makes default, and fails to plead or otherwise appear in said cause, and the said A. W. Bennett is by the court adjudged to be in default for an answer, and not entitled to answer or plead until he shall comply with the other order heretofore made," etc.

These findings of fact made by the court were followed by the judgment of the court awarding to the plaintiff the former homestead of the parties as her sole property, $6000.00 permanent alimony and $500.00 attorney fees, and the costs of this action.

On April 30, 1904, defendant, A. W. Bennett, filed in said court his notice of appeal, which notice, omitting the entitling of the cause, is as follows:

"Notice of Appeal.

"Notice is hereby given by the defendant Albert W. Bennett that it is his intention to appeal from the decree of the court in the above entitled cause of action, granting the plaintiff, Sarah Grace
89 Bennett a divorce from this defendant and decreeing her, the said plaintiff, alimony and suit money and the costs of the suit against this defendant.

ALBERT W. BENNETT,
By His Att'ys."

From the foregoing judgment and decree the case comes to this court upon petition in error and a transcript of the record.

Opinion of the court by GILLETTE, *J.*:

It is manifest from the brief of plaintiff in error filed in this case that but a single question is raised by this appeal calling for a review by this court, and that is: Is it within the province and power of the District Courts of the Territory in a divorce case where defendant has been personally served with summons and fails to appear or answer for nearly one year, and where he has also been served with an

order for the payment of temporary alimony and fails and refuses to obey the order, and when the case is called for trial then for the first time appears and asks leave to answer, to impose any terms or conditions to the granting of such leave.

The answer to this question must inevitably determine this case. If the court must, under such circumstances receive the answer without terms or conditions of any kind or nature attached to the granting of such leave, then there was error in the trial court, and the cause must be remanded for a new trial. On the other hand if, under such circumstances, the court may in its discretion impose any terms or conditions to the granting of such leave, and the filing of such answer, then there was no error and, unless there was an abuse of discretion, the judgment must be affirmed.

The very fact of asking leave of the court to answer, seems to the writer of this opinion to furnish the response to this inquiry. If the court could not impose terms, then the party has an absolute right to place his answer on the files of the court without any application to the court, and whether the court was willing or unwilling; and the request for leave to file the same was a mere formality, without significance, and tending rather to ridicule the court than to honor or respect its authority.

The case has been elaborately argued by counsel in their briefs, and we have therefore devoted to it more than ordinary attention, and have very carefully examined the cases cited and relied upon by the plaintiff in error.

As a basis for his argument it is first contended that the plaintiff in error had never been legally convicted of any contempt of court. It must be remembered that the petition was filed on the 21st day of May, 1903, and that on the same day a notice of the application for alimony *pendente lite* was served personally on the plaintiff in error, notifying him that the application would be heard before the judge of the court at Chambers on the 23rd instant. The record also shows that the application was presented, and the order for temporary alimony made, by the judge at chambers on the said 23rd of May, 1903; also that the first appearance, and so far as the transcript shows, the only attention ever given by the plaintiff in error to said cause, was made by his counsel on the 6th day of April, 1904, nearly eleven months after the filing of the suit, during most of which time plaintiff in error had been absent from this Territory, though personally served with an *alias* summons on the 17th of February, 1904. The appearance, as shown by the transcript was a special appearance only for the purpose of challenging the jurisdiction of the court, and on the motion being overruled, "the defendant asked leave to file his answer herein." That defendant was in contempt of the order of the court for the payment of alimony is neither denied or questioned; in other words, that he had been notified of the application, and that the order had been made by the court on the 23rd day of April, 1903, in pursuance of the notice and motion; and that the order had been at once served upon him, and that he had never complied or attempted to comply with the same, and had

offered no excuse or explanation for not complying, are all
91 undisputed and unquestioned facts.

With this state of facts it is now gravely argued that because defendant A. W. Bennett had not been attached and brought before the court, formally arraigned and adjudged guilty of contempt, therefore the court could not impose any terms or conditions to the leave granting him permission to answer the petition several months after his time for answering had elapsed. It must also be noticed that this request was made without the slightest attempt to explain or excuse his laches, and also, what is quite as important, without disclosing the nature or character of the answer which he desired to make.

That the mercy of the court had so long permitted the defendant to go unpunished for his contempt we do not think should now be construed as establishing his innocence or entitling him to any favor at the hand of the court on that account. The record reads: "And now the defendant asks leave to file his answer herein, and it is by the court ordered that the said request be granted upon the condition that said defendant comply with the former order of the court requiring said defendant to pay temporary alimony and attorneys' fees within five days from this date," which was afterwards extended to April 13.

This is the record complained of, and as to which plaintiff in error says: "Had plaintiff in error, however, been in contempt of court, a denial to him of any substantive right was error," and from thence proceeds to argue that it was not within the province or power of the court to refuse the leave to answer thus requested, or to attach any conditions to the granting of such request. Counsel then proceeded to cite and quote at considerable length from the case of Hovey *v.* Elliott, 167 U. S. 409. We have examined that case with care, and because of the controlling authority of that tribunal over this court, we feel called upon to explain at some length why we think the holding in that case is not control-ing in the case at bar. That was an action in equity growing out of the sale of some bonds, the object of the suit being to compel the defendant to account for the
92 bonds or their value, upon the theory that the defendants had acquired them with actual notice of pending litigation concerning them, and were bound by the result of the judgment rendered in the other action. This action had been put at issue by filing an answer, averring fraud and wrong doing on the part of the plaintiffs in that suit, the answer alleging facts which, if found to be true, would have defeated a recovery by the complainants. After replication, testimony was taken at various times during the years 1875 and 1876. In June 1877 the complainants obtained an order from the Supreme Court of the District of Columbia requiring the defendants to pay over to the registry of the court the sum of $42,297.50, which had been paid to defendants by the receiver. This order was disobeyed, and thereupon the complainants in September, 1877, moved the defendants to show cause why they and each of them should not be punished for disobedience of the order as for

a contempt. On December 8, 1877, the Supreme Court of the District of Columbia made a decree that "the rule upon the defendants to show cause why they should not be decreed to be in and punished as for a contempt of court, etc., be made absolute, and that the said McDonald & White be taken and deemed to be in contempt of the aforesaid order." The decree then proceeds: "Unless McDonald & White, within six days from the entry of this order, and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of June 19, 1877, and pay into the said registry of this court the sum of $49,297.50, the answer filed by them in the cause shall be stricken out, and that this cause proceed as if no answer had been interposed."

The defendants not having complied with the order, the answer of the defendants was stricken out and removed from the files of the court, and thereafter the cause was proceeded with as if no answer had been filed in the case. The bill was thereupon taken as confessed, and decree rendered against defendants, and there-
93 after came to the Supreme Court of the United States by writ of error. Upon this state of facts the Supreme Court in passing upon the case uses this language:

"In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary powers to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, to strike his answer from the files, suppress the testimony in his favor and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and thence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

To much the same effect is the case of McVeigh *v.* United States 11 Wall. 259, wherein the court says:

"In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion our opinion will be confined to that subject. The order in effect denies the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. The

liability and the right are inseparable. A different result
94 would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt upon the subject. It would be contrary to the first principles of the social compact and of the right of administration of justice."

Referring to the above case in Windsor *v.* McVeigh, 93 U. S. 274, speaking through Mr. Justice Field, the court again said:

"The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, is not entitled to respect in any other tribunal."

This case of Windsor *v.* McVeigh was an action of ejectment for a tract of land situated in the city of Alexandria, Virginia. Under the act of Congress of June 17, 1862; "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," the property had been seized by the marshal of the district, and a libel thereafter filed by direction of the attorney general, setting forth "that the owner of the property had, since the passage of the act, held an office of honor and trust under the government of the so-called Confederate States, and had given aid and comfort to the rebellion." Upon this libel the district judge ordered process of monition to issue as prayed, and that notice of the same be given by publication in a newspaper. Publication was made as directed, and the owner of the property appeared by counsel, and filed a claim to the property, and an answer to the libel. Subsequently the district attorney moved that the claim and answer, and the appearance of the respondent by counsel, be stricken from
the files, on the ground that it appeared from his answer that
95 he was at the time of filing the same "a resident within the city of Richmond, within the Confederate lines, and a rebel." This motion was granted, and the claim and answer ordered to be stricken from the files, and the court thereupon immediately entered a decree condemning the property as forfeited to the United States. This was the state of facts upon which the court was passing in using the language above quoted.

It will be observed that in each and all these cases the defendant had appeared in due and proper time, and filed his answer therein. He was not in default, and he was not before the court asking for any favor at the hands of the court. He was then properly in court, and standing strictly upon his legal rights in reference to the action then pending, and in which he had been summoned to appear. He had submitted himself and his cause to the jurisdiction of the court, and was bound by any action it might take in regard thereto.

In the leading case of Hovey *v.* Elliott, the case had been at issue for nearly two years, and considerable testimony in the case had

been taken by deposition, before the order was made for the payment of money into the registry of the court, the non-compliance with the order being the sole cause and only excuse for the court striking out his answer, and the evidence taken in his behalf, declaring the case in default and ordering all proceedings on the part of defendants in the case to be perpetually stayed.

In concluding its decision in that case the court after pointing out the salient features of the case, concludes its opinion in these suggestive words: "and our opinion is therefore exclusively confined to the case before us."

It is most apparent that the facts in this case were widely and radically different from those in the case at bar. In that case a good and sufficient answer had been filed in due and proper time. In this case no answer had been filed or tendered, and no intimation given the court that the answer desired to be filed would have constituted any defense to the action if it had been admitted.

96 In that case a large amount of testimony on the part of defendant had been taken by depositions and was on file with the court, and after all this had been done the order for the payment of money to the registry of the court was made. In this case no testimony had been taken, the order for the payment of alimony was made at the time of filing the petition, and defendant has never appeared in the case except to ask leave to file an answer without any explanation or excuse for his disregard of the order, and without alleging or ever pretending that he had any meritorious defense to the action.

It must be readily seen that in Hovey *v.* Elliott the defendant was not only rightfully in court, but he had certain existing and established rights there, and these rights were not merely denied, but they were swept away by the arbitrary order of the court, on the theory of thereby punishing him for contempt.

In this case defendant had never been in court, but had wilfully refused to appear therein, or to give the slightest heed to the proceedings therein. In that case the defendant was asking no favor or indulgence of the court. In this case he is in default, and moving the court to grant him both favor and indulgence to wit, leave to appear and answer out of time, because of his wilful refusal to appear when summoned. In that case the order was to punish the contempt. In this case the order is a condition to granting the favor.

No doubt there is language in the case which by analogy may be applied to the case before us, but when it is remembered the court expressly limits the decision to the case then before it, it is, to say the least, extremely doubtful whether the case furnishes any authority in a case such as is presented by this record. Most certainly the case was not presented upon the same state of facts as those presented in this case, and is therefore not an authority in point in this case, either upon the facts, or the subject matter of the action.

97 We cannot better at once express our approval of the decision in that case and our dissent from its application to the

case before us, than by quoting the remarks of Lord Halsbury under somewhat similar circumstances, in the case of Quinn *v.* Leatham (1901) A. C. 495, wherein he said:

"Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found;" and again, "That a case is only an authority for what it actually decides."

In the case of McVeigh *v.* United States, 11 Wall., 259, and Windsor *v.* McVeigh, 93 U. S. 274, which were cases arising under the act of Congress for the confiscation of the estates of "rebels," the property of the defendants had been attached by the sheriff, and a monition issued to the owners to show cause why the estates should not be confiscated by the government, and to this order the defendants appeared and answered, setting up title to the property, and denying the right of the government to seize the same. The motion to strike out the answer alleged that defendants were rebels and alien enemies, and therefore had no right to be heard in defense of the action. This motion was sustained, and the answers stricken out, and all right to defend the action denied them.

To this argument the supreme court in delivering its opinion replied:

"The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable."

And later on in the decision the court adds:

"It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of judicial sentence."

98 This comprehensive language finds justification in the extraordinary circumstances of the cases then before it, and must be read as applicable to the facts then being considered.

In neither is there any fact or circumstance common to the case now under consideration. In each of these instances the party appeared in proper time, and filed his answer. He came into court at a time when he had a legal right to come, and therefore had a legal right in the court at the time he was summarily dismissed therefrom.

The case of Foley *v.* Foley, 52 Pac., 122, is also relied upon by plaintiff in error as an authority against the judgment entered in this case. That was an action for divorce, and in that respect in point in this case. But the statement of the facts reads:

"The defendant Foley interposed a demurrer to the complaint; but the court, on motion of plaintiff, struck out his demurrer, and gave judgment against him, as by default, for his failure to pay certain alimony ordered by the court, and for neglect and refusal to subscribe his deposition taken in the action."

It will thus be seen the defendant in that case was not in default, but was in court in proper time and standing on his legal right, asking no favor of the court beyond what the law gave him, and that these were arbitrarily brushed aside on the theory of thereby punishing him for contempt. In the case at bar defendant was never in court, save to ask leave of the court to file an answer out of time, and this request was granted, and he was given seven days in which to file his answer, on condition that he now comply with the former order of the court. It is not claimed that the condition which the court attached to granting him the favor asked was onerous, unreasonable or impossible of performance by defendant, and therefore an abuse of discretion; neither was any answer tendered in the case, nor any claim presented to the court in any form demanding the right which is now for the first time presented by the defendant. Had the claim which is now presented in
99 this court and urged with so much tenacity been presented to the court below, it may well be that the trial court would have modified the conditions attached to leave to answer, or have granted the leave without condition.

Only in extraordinary cases will this court reverse the order or ruling of a trial court, where the question upon which the reversal is sought was never submitted or suggested to that court. It must not be forgotten that defendant's answer was not stricken out; it was not refused, and the only cause or ground of complaint now is that the condition attached to the favor of the court in granting leave to answer, were beyond the limits of its power.

The powers and authority of the various courts of this Territory are specifically designated in section 9 of the organic act, wherein it is provided, *inter alia,*

"And said Supreme and District Courts shall possess chancery as well as common law jurisdiction, and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property."

This is undoubtedly a delegation of chancery power and authority to the supreme and district courts of this Territory, as broad and comprehensive as that possessed by the chancery courts of England, and beyond all question confers power in those courts over the process, orders or judgments by them entered, and authorizes the exercise by them of a sound discretion in the manner and form of proceedings therein.

In view of the financial condition of the defendant we do not think that the terms imposed by the court upon the plaintiff in error as prerequisite to filing his answer were unreasonable or burdensome for the defendant to have complied with. Plaintiff in error made no effort to show or even complain that the amount was excessive, or that he was unable to pay, nor did he ever claim that he had any defense to the merits of the action. Under the facts in this case we do not think there was any abuse of discretion on the part of the trial court in imposing the terms it did as a
100 condition to defendant filing his answer in the case. It is impossible to read this record and not be convinced that the

plaintiff in error wilfully and intentionally set the trial court at defiance, and both intended and attempted to evade and disregard any order or decree the court might make in the case.—See Maharry *v.* Maharry, 5 Ok. 871.

We find no error in the record, and the decree of the court below will be affirmed.

All the justices concurring, except Burford, C. J., who tried the cause below, not sitting.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

In the Supreme Court.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion in the cause of A. W. Bennett Pl'ff in Error *versus* Sarah Grace Bennett, Def't in Error which opinion was rendered by said Supreme Court at the June 1905 Term, on the 7th day of September, 1905.

In witness whereof, I hereunto set my hand and affix the seal of said Supreme Court, at Guthrie, this 6th day of December, 1905.

BENJ. F. HEGLER,

[SEAL.] *Clerk Supreme Court.*

101 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

Certificate.

I, Benj. F. Hegler, Clerk of the Supreme Court, of the Territory of Oklahoma, do hereby certify that the foregoing 100 pages, numbered from 1 to 100, inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of A. W. Bennett, Plaintiff in error, *vs.* Sarah Grace Bennett, Defendant in error, as the same remain upon the files and records of said Supreme Court.

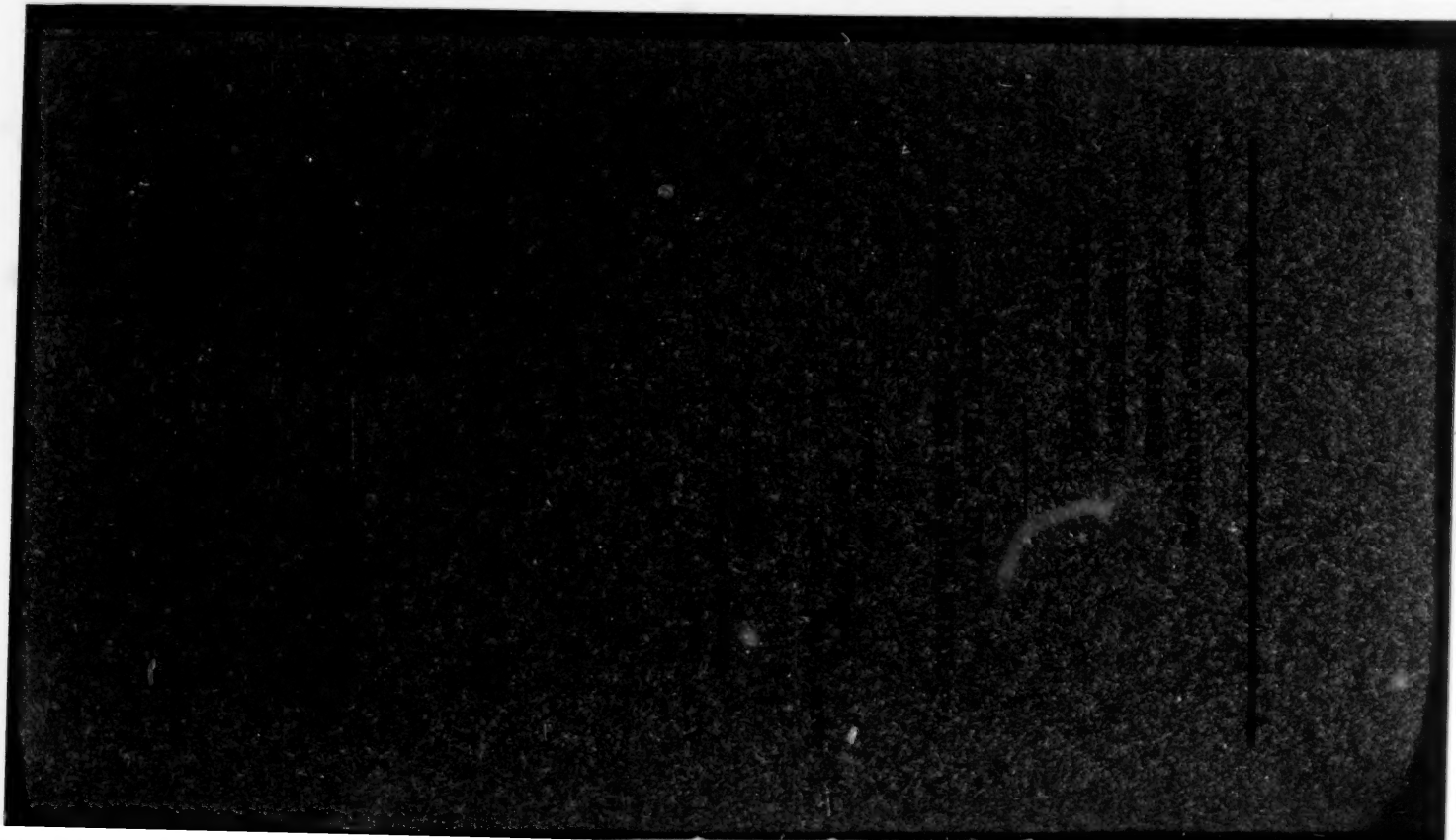
In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 7th day of September, A. D. 1906.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,

Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20363. Oklahoma Territory, supreme court. Term No. 98. A. W. Bennett, plaintiff in error and appellant, *vs.* Sarah Grace Bennett. Filed September 14, 1906. File No. 20363.



—IN THE—

Supreme Court

OF THE

OF THE UNITED STATES

October Term, 1907

A. W. Bennett
Plaintiff in Error and Appellant,

vs.

Sarah Grace Bennett,
Defendant in Error and Appellee.

No. 98

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT

STATEMENT.

The facts, so far as necessary to a determination by this court of the errors relied upon by plaintiff in error and appellant, (hereinafter called defendant) may be stated as follows:

That, on the 21st day of May, 1903, defendant in error and appellee, (hereinafter called plaintiff) filed in the District Court of Lincoln County her original petition against said defendant praying for a dissolution of the marriage relation then existing between them, for temporary alimony, suit money, counsel fees, setting aside of the conveyance made by the defendant to his minor son by a former marriage and a division of defendant's property upon the grounds therein stated (R. pp. 9-14); that thereafter and on the same date, a summons was issued in said cause to the sheriff of said Lincoln County, who returned same on May 22, 1903, as having been served by leaving a copy at the usual place of residence of defendant at 8:55 A. M. of said day (R. pp. 14-15); that on the said 21st day of May, 1903, a copy of an application for temporary alimony, suit money and restraining order was served on defendant, as shown by the affidavit of Victor S. Decker, one of the attorneys for plaintiff, who states that he went to the office of defendant and offered to deliver him an exact copy of said application (R. pp. 15-17); that there-

after and on the 23rd day of May, 1903, said application was presented to the Judge of said District Court at his chambers in the city of Stillwater, Payne County, Oklahoma, in the absence of defendant, and without any appearance by or for him, and said Judge made an order, among other things, requiring said defendant to pay into the office of the Clerk of the District Court of said Lincoln County, within ten days from said date, the sum of one thousand ($1,000) dollars as temporary alimony and suit money for plaintiff, and the further sum of one hundred ($100.00) dollars for her attorneys (R. p. 18); thereafter, and on July 21, 1903, plaintiff filed in said cause her amended petition, which contains substantially the same allegations as those set forth in her original petition (R. pp. 18-22) and, in addition thereto, an alleged third cause of action, challenging, on more specific grounds, the validity of the conveyance by defendant to Harry M. Bennett, his minor son by a former marriage, made on May 20, 1903, and also challenging the validity of a certain assignment alleged to have been made by defendant to H. M. Johnson and

B. W. Buck, and the lease of the homestead of plaintiff and defendant, said to have been made by defendant to one Perkins, and stating further that the former order of the Judge of said District Court, made at his chambers in Stillwater on the 23rd day of May, 1903, had not been complied with and that defendant had furnished nothing to the support of plaintiff since May 20, 1903 (R. pp. 22-23); and the prayer to plaintiff's amended petition is somewhat more full than that to her original petition in that she asks specifically, in the latter, "that said homestead be decreed to her as permanent alimony, and in addition thereto other permanent alimony as the court thinks right, equitable and just for the support of plaintiff and the child * * * and that any judgment she may obtain as permanent alimony be declared a lien on said estate described in this petition and subjected to the payment of said alimony" (R. pp. 23-24); thereafter, and on the same date, said plaintiff filed in said cause her affidavit to procure service by publication on said defendant alleging, in substance, that he was a non-resident of the Territory of

Oklahoma and that service by summons could not be made upon him therein after due diligence (R pp. 33-34); thereafter, and on the 22nd day of July, 1903, a notice of publication was issued on said affidavit by the Clerk of said District Court and, thereafter, and on the 17th day of August, 1903, an affidavit was made by J. Thomas Melton, as business manager of the Chandler News, showing the publication of said notice for three consecutive weeks, the first publication being on the 23rd day of July, and the last on the 13th day of August, 1903 (R. p. 36); thereafter, and on the 17th day of February, 1904, a summons for defendant in said cause was issued to the sheriff of said Lincoln County, which was returned by said sheriff on February 18, 1904, showing service thereof on said date by delivering to said defendant personally a true and certified copy thereof, which said summons fixed March 12, 1904, as answer day (R. pp. 40-41); thereafter, and on the 6th day of April, 1904, defendant's motion to quash the service of said summons (which had been previously filed but on what day is not shown) came on for hearing and was overruled by the court;

"Whereupon the defendant, A. W. Bennett, by his attorneys, offered to file his answer in this cause, instanter, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court heretofore made, to pay to the plaintiff in this cause the sum of one thousand dollars, as and for temporary alimony, and one hundred dollars as attorney's fees in this case, but made the further order that the said defendant should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order within that time; to which order of the court the defendant, Albert W. Bennett, excepted at the time." (R. p. 12).

Thereafter, and on April 29, 1904, a judgment by default was rendered against said defendant and in favor of said plaintiff, finding and decreeing, among other things:

"That on the 5th day of April, 1904, the defendant, A. W. Bennett, appeared by his attorneys, and asked leave to file his answer herein out of time, which request was objected to by the plaintiff for the reason that the defendant had failed to comply with the order theretofore made to pay the Clerk of the court for the use of the plaintiff the sum of one thousand dollars as and for temporary alimony and the further sum of one hundred dollars as and for attorney's fees for her attorneys, and the court being advised that the defendant had not complied with said order or offered any excuse for his failure so to do, his application for leave to answer is refused until he shall comply with said former order, or show cause why he has not, and he is given five days to make said showing, and in which to file his said answer. * * * That the plaintiff is entitled to have and recover of and from the defendant, A. W. Bennett, the sum of $6,000.00 and lots 19 and 20 in block 28, the same being the homestead of plaintiff and defendant, as permanent alimony, and that she recover the further sum

of $500.00 as, and for the payment of plaintiff's attorney fees and the costs of this suit. * * *

And it is further ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant, A. W. Bennett, the sum of $6,000.00 as permanent alianony and in addition to the $6,000.00 as alimony, it is hereby ordered, adjudged and decreed that the plaintiff, Sarah Grace Bennett, be and she is hereby awarded in fee lots 19 and 20 in block 28 in East Chandler, Lincoln County, Oklahoma Territory, as her sole and separate property. * * * and that, in addition thereto, the plaintiff, Sarah Grace Bennett, do have and recover of and from the said defendant, A. W. Bennett, the sum of $500.00 as attorney fees as and for her attorneys, S. D. Decker and Fred A. Wagoner, and the costs of this suit herein taxed at $.....

It is further ordered by the court that the order heretofore made for the sum of $1,000.00 as temporary alimony for plaintiff and $100.00 as and for her attorney fees is hereby vacated and set aside." (R. pp. 45, 46, 48 and 49);

Thereafter, and on the 26th day of August, 1904, said case was taken to the Supreme Court of Oklahoma by petition in error on a transcript of the record of the trial court (R. pp. 8-9 and 50-52); that thereafter and at the June, 1905, term of the Supreme Court of Oklahoma, and on September 7, 1905, a judgment was rendered and an opinion handed down by said court affirming the judgment of the District Court of Lincoln County, Oklahoma (R. pp. 52-68).

Such other facts as may be deemed material will be stated in the argument.

ERRORS ASSIGNED.

1. The Supreme Court of Oklahoma erred in affirming the action of the trial court in holding, or rather assuming, that defendant therein was in contempt of said court for failing to comply with the order of the judge thereof, at Chambers, requiring him to pay into the office of the clerk of the court the sum of $1,000.00 temporary alimony and $100.00 attorney's fees for the use of plaintiff and her counsel.

2. The said Supreme Court of Oklahoma erred in affirming the action of the trial court in holding, or assuming, that defendant therein was in contempt of court for failing to comply with the said order of the judge thereof at Chambers directing him to pay into the office of the clerk of the court the sum of $1,000.00 temporary alimony and $100.00 as attorney's fees for the use of plaintiff therein and her attorneys, without first having cited the defendant to show cause why he should not be adjudged in contempt for failure to comply with said order.

3. The said Supreme Court of Oklahoma erred in

affirming the action of the trial court in making an order that defendant should not be permitted to answer the amended petition of the plaintiff in said cause, or to make any defense thereto, except on condition that he, within five days, comply with the said former Chambers order directing him to pay into the office of the clerk of the court $1,000.00 as temporary alimony and $100.00 as attorney's fees for the use and benefit of plaintiff and her counsel.

4. The said Supreme Court of Oklahoma erred in affirming the action of the trial court, refusing to permit defendant therein to make his defense to said cause unless he should first comply with the order of the judge thereof at Chambers requiring him to pay said temporary alimony and attorney's fees, and in adjudging him to be in contempt and rendering judgment against him by default.

5. The said Supreme Court of Oklahoma erred in affirming the judgment of the trial court, rendered by default, awarding plaintiff therein $6,500 permanent alimony and attorney's fees, and certain real property

formerly constituting the homestead of plaintiff and defendant.

ARGUMENT.

I.

In affirming the judgment of the District Court of Lincoln County in the case at bar, the Oklahoma Supreme Court commences its opinion by stating the proposition to be decided as follows:

"It is manifest from the brief of plaintiff in error filed in this case that but a single question is raised by this appeal calling for a review by this court, and that is this: Is it within the province and power of the District Courts of the Territory in a divorce case where defendant has been personally served with summons and fails to appear or answer for nearly one year and where he has also been served with an order for the payment of temporary alimony and fails and refuses to obey the order, and when the case is called for trial then for the first time appears and asks leave to answer, to impose any terms or conditions to the granting of such leave.

The answer to this question must inevitably determine this case.

If the court must, under such circumstances, receive the answer without terms or conditions of any kind or nature attached to the granting of such leave, then there was error in the trial court, and the cause must be remanded for a new trial. On the other hand, if under such circumstances, the court may in its discretion, impose any terms or conditions to the granting of such leave, and the filing of such answer, then there was no error and, unless there was an abuse of discretion, the judgment must be affirmed." (R. pp. 60-61.)

As already specifically pointed out in the preceding statement of facts, the record in this case clearly shows that the court below was in error in assuming that defendant had been personally served with summons for nearly one year prior to the date on which his counsel tendered and offered to file an answer in said cause, as the *alias* or second summons, being the only one ever personally served upon him, and the only one issued after the filing of plaintiff's amended petition, was not served until February 18, 1904, and required him to answer by March 12, 1904, whereas, defendant's answer was tendered on April 6, 1904. (R. pp. 40, 41 and 42.)

Furthermore, it is also clearly shown that defendant was then only technically in default, inasmuch as he had previously filed a motion to quash the service of said summons which was, on said last named day, presented to and heard by the trial court and decided on its merits, and it appears that immediately after the ruling of said court on this motion defendant's answer was tendered (R. p. 42). It has been repeatedly

held by the Supreme Court of Oklahoma that a party defendant has the right to challenge the jurisdiction of the court in this way and then file his answer and go to trial on the merits without waiving the question of jurisdiction raised by such motion.

In Chicago Bldg. & Mfg. Co. vs. Pewthers (Okl.), 63 Pac. 964, it is held that:

"Where a court has no jurisdiction over the particular cause, or of the person of the defendant and the defendant appears specially for the purpose of calling the attention of the court to such irregularities, and the court thereupon overrules his motion to such jurisdiction, he may save his exception, file his answer and proceed to trial without waiving such error."

The rule announced in the above case is followed in St. Louis & S. F. R. Co. vs. Clark (Okl), 87 Pac. 430.

The same rule has also been repeatedly laid down by this court: Harkness vs. Hyde, 98 U. S. 476; 25 L. Ed. 237; Southern Pacific Co. vs. Denton, 146 U. S., 202; 36 L. Ed. 942; Mexican Central R. Co. vs. Pinkney, 149 U. S. 192; 37 L. Ed. 699.

The next paragraph of the opinion handed down by the Oklahoma Supreme Court, following the portion hereinbefore quoted, reads as follows:

"The very fact of asking leave of the court to answer, seems to the writer of this opinion to furnish the response to this inquiry. If the court could not impose terms, then the party has an absolute right to place his answer on the files of the court without any application to the court and whether the court was willing or unwilling; and the request for leave to file the same was a mere formality, without significance and tending rather to ridicule the court than to honor or respect its authority."

While there are some statements in the journal entry of judgment rendered by the trial court, after defendant had been adjudged in default and refused an opportunity to participate in the trial of said cause, to the effect that he had asked leave to file his answer out of time, etc., the order made by said court and signed at the time the answer of the defendant was tendered by his counsel, and which was then and there excepted to by them, reads as follows:

"Whereupon the defendant, Albert W. Bennett, by his attorneys, offered to file his answer in this cause, instanter, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court heretofore made, to pay to the plaintiff in this cause the sum of one thousand dollars as and for temporary alimony and one hundred dollars as attorney's fees in this case, but made the further order that the said defendant should be permitted to file his said answer, within five days, on condition that he purge hmself of said contempt by complying with said order within that time," (R. p. 42.)

Thus it is seen that the real proceding taken by defendant's counsel was to tender his answer and offer to file same instanter, rather than to ask leave to file the answer out of time. In any event, the refusal of the trial court was based entirely upon the ground that defendant was in contempt and must purge himself thereof before he would be entitled to file his answer in said cause, or offer any defense thereto.

On the question of defendant's being in contempt by reason of his failure to comply with the order of the judge of the trial court, for the payment of temporary alimony and attorney's fees, the Oklahoma Supreme Court say, in part:

"That defendant was in contempt of the order of the court for the payment of alimony is neither denied or questioned; in other words, that he had been notified of the application, and that the order had been made by the court on the 23rd day of April, 1903, in pursuance of the notice and motion; and that the order had been at once served upon him, and that he had never complied or attempted to comply with the same and had offered no excuse or explanation for not complying, are all undisputed and unquestioned facts." (R. pp. 61-62.)

Said court further says, in this connection, that:

"With this state of facts, it is now gravely argued that because defendant, A. W. Bennett, had not been attached and brought before the court, formally arraigned and adjudged guilty of contempt, therefore, the

court could not impose any terms or conditions to the leave granting him permission to answer the petition several months after his time for answering had elapsed." (R. p. 62.)

Now we, again, notwithstanding the contrary opinion of the Oklahoma Supreme Court, "gravely argue that because defendant, A. W. Bennett, had not been attached, and brought before the court, formally arraigned and adjudged guilty of contempt," the trial court committed prejudicial error in assuming that defendant was in contempt of court for failure to comply with the former order made by the judge thereof to pay temporary alimony and attorney's fees; and, in support of this contention, we submit that, under the laws of Oklahoma Territory, before any person can be legally adjudged guilty of contempt of court, by reason of his having refused to obey an order of the court or judge, he must be complained against in writing, cited to appear before the court and show cause why he should not be punished for such contempt, and given an opportunity to be heard.

"Indirect contempt of court shall consist of willful disobedience of any process or order lawfully issued or made by a court." Okla. Rev. Stat., Sec. 2125.

"Indirect contempt shall be shown to the court by information stating the facts constituting the contempt, and the facts may be shown either by affidavit or testimony of witnesses, as the court may direct." Okla. Rev. Stat., Sec. 2126.

"In all cases of indirect contempt, the party charged with contempt shall be notified in writing of the accusation, and have a reasonable time for defense." Okla. Rev. Stat., Sec. 2127.

Johnson vs. Superior Court, 63 Cal. 578.

It is also provided by General Section 4037 of said statutes that:

"After a petiiton has been filed in an action for divorce and alimony, or for alimony alone, the court, or a judge thereof in vacation, may make and enforce by attachment, such order to restrain the disposition of the property of the parties, or either of them, and for the use, management and control thereof, or for the control of the children and support of the wife, during the pendency of the action, as may be right and proper."

It would seem from the language contained in said Section 4037 that the court's power to enforce compliance with an order awarding temporary alimony is limited to the attachment of defendant, followed by fine and imprisonment if he is found guilty of wilfully disobeying such order. This view is supported by the language of the Oklahoma Supreme Court in *Hutchison vs. Canon*, 6 Okl. 725 (found on page 728), declaring that

"If these orders cannot be enforced by attachment and imprisonment, as for contempt of court, they cannot be enforced at all for the reason that no other means of enforcement is provided."

From the statement of facts in that case, we learn that Hutchison, the petitioner for a writ of *habeas corpus* therein, had been adjudged guilty of contempt "upon a proper hearing * * * for a refusal to obey such order." (P. 726.)

See, also, on the question of statutory limitation of such power, *Johnson vs. Superior Court, Supra; Hovey vs. Elliott,* (*N. Y.*) 39 N. E. 841.

In the case at bar, the record discloses that no application for an attachment was ever made and, in fact, no order was ever passed directly adjudging defendant in contempt. Had any such attachment or citation been issued and served on defendant, he would, unquestionably, have been entitled to be heard before being finally adjudged in contempt. As has been so well said by the Supreme Court of California, in *McClatchy vs. Superior Court,* 51 Pac. 696 (698):

"Contempt of court is a specific criminal offense (*Ex parte Hollis,* 59 Cal. 408; *Ex parte Gould,* 99 Cal. 360, 33 Pac. 1112); and a party charged therewith, al-

though the proceeding is more or less summary in character, has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt, as he would against a charge of murder or any other crime. On this subject, it is said in *Rapalje on Contempts* (section III.) "Contempt of court is of two kinds—that which is committed in open court and that which is committed out of the view and hearing of the court. For the punishment of the first, by committment and fine, no proceeding need be taken contradictorily with the offender, but for the punishment of the latter, by the same means, the offender must be allowed to offer evidence and argument in his defense: otherwise any judgment which the court may pronounce will be absolutely void."

See, also, *Galland vs. Galland*, 44 Cal. 475, wherein it is further held that:

"The statute of this State in relation to contempt is a limitation upon the power formerly exercised by courts to punish for contempt."

In *Palmer vs. Palmer*, (Fla.) 18 So. 720, it is held that:

"In a suit in equity where contempt proceedings are instituted for violation of the court's orders in the cause, it is error to adjudge the accused party to be guilty, without having had notice of the charge of contempt and without his being afforded an opportunity to purge himself therefrom. In such a case, where no notice of the charge of contempt has been given to the accused party, it is error for the court, as a punishment for the contempt, to refuse to hear the party upon the merits of the cause, or to treat him as one in default, by ordering testimony to be taken *ex parte* on the merits, and by the rendition of an *ex parte* final decree, in disregard of his pleadings on file."

The correct rule on this question is stated in 9 Cyc.

at page 39, *et seq.*, as follows:

"Before a person can be found guilty of contempt not committed in the presence of the court he must have due and reasonable notice of the proceeding. A rule to show cause, an attachment or other process should issue. The usual course is to issue a rule to show cause why an attachment should not issue. * * * The rule to show cause should inform the defendant of the nature of the contempt alleged. If the statute, or rule of court, requires it, the facts constituting the contempt should be set out. An attachment, to be valid, should be sufficient in form and substance. It is good if it shows on its face that it was issued in a proceeding in which the court has jurisdiction, and contains the matters prescribed by statute or rule of court."

Not only had defendant in the case at bar never been cited to show cause why he should not be adjudged in contempt for his failure to comply with the order of the trial judge to pay temporary alimony and attorney's fees but, in the final judgment rendered against him granting plaintiff a divorce and permanent alimony in the sum of $6,000.00 together with title to certain real estate owned by defendant, the court vacated and set aside said previous chambers order, awarding temporary alimony and counsel fees, as shown by the following language contained in said judgments:

"It is further ordered by the court that the order heretofore made for the sum of $1,000.00 as temporary

alimony for the plaintiff and $100.00 as and for her attorney's fees, is hereby vacated and set aside." (R. p. 49.)

In other words, the trial court held this *ex parte* chambers order as a menace over defendant and used it as a means of precluding him from making any defense whatever to the merits of the action for divorce and alimony and then, after rendering judgment by default against him, not only awarding the plaintiff a divorce but a very large (if not excessive) amount as permanent alimony and attorney's fees, vacated said order, without ever having attempted to enforce same in the manner prescribed by statute.

It is next stated in the opinion of the court below that:

> "It must be noticed that this request was made without the slightest attempt to explain or excuse his *laches*, and also, what is quite as important, without disclosing the nature or character of the answer which he desired to make.." (R. p. 62.)

As already shown the defendant has never been called on, in any legal manner, "to explain or excuse his laches," and, inasmuch as no question was raised as to the sufficiency of the answer tendered by the defendant in the trial court but, on the contrary, his offer to file

same was refused solely on the ground that he had failed to comply with said previous order of the trial judge, we take it that this action on the part of the trial court can hardly be sustained by an appellate tribunal on the ground that the contents of the answer are not disclosed in the record and that it may have been insufficient, in point of law, to raise any material issue on the allegations contained in plaintiff's amended petition. In fact, we can hardly conceive of an answer, in this character of action, which would not have joined such issue, unless it had simply confessed all material allegations contained in said amended petition, and if this had been its character, we apprehend that plaintiff's counsel would not have been found objecting to its being filed.

II.

However, we confidently submit that, had defendant in the case at bar been legally adjudged guilty of contempt for his wilful failure to comply with said order to pay temporary alimony and counsel fees, still the trial court committed prejudicial error in denying him the right to file his answer and make his defense to

said action. This proposition, we think, has been clearly and definitely settled by this court in the case of *Hovey vs. Elliott*, 167 U. S., 409, 42 L. Ed. 215.

The writer of the opinion in the court below recognizes the controlling authority of the case last cited upon this proposition but attempts to make a distinction between that case and the one at bar on the ground that the answer had already been filed therein and was subsequently stricken from the files, whereas, in this case defendant had failed to file his answer within the time prescribed by statute and was, consequently, asking leave of the court to file same out of time. In other words, if defendant in the case at bar had filed his answer on or before the 12th day of March, 1904, instead of the motion to quash the service of summons, it would have been unquestioned error for the trial court to have stricken same from the files and denied him the right to defend but, inasmuch as defendant desired first to test the legality of the service of the *alias* summons (which would have been waived by filing an answer to the merits), it is held by the court below that the trial court had legal

authority to refuse him the right to file such answer, though tendered immediately upon the disposition of said motion and notwithstanding that such refusal is based exclusively upon the ground "that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court heretofore made, to pay to the plaintiff in this case the sum of $1,000.00 as and for temporary alimony and $100.00 as attorney's fees in this case," and notwithstanding that the trial court then made a further order permitting defendant "to file said answer within five days upon condition that he purge himself of said contempt by complying with said order within that time." (R. p. 42.)

In addition to the foregoing order, it is further held in the final judgment and decree rendered by default that "the defendant, A. W. Bennett, having failed to comply with the former order of the court, or make excuse for not complying and having failed to answer the petition of the plaintiff herein, the said defendant, A. W. Bennett, is now called three times in open court but makes

default and fails to plead or otherwise appear in said cause and the said A. W. Bennett is by the court adjudged to be in default for answer, *and not entitled to answer or plead* until he shall comply with the order heretofore made wherein the said A. W. Bennett was ordered by the court to pay to the plaintiff $1,000.00 temporary alimony and $100 attorney fees for her attorneys." (R. p. 45.)

From the foregoing orders it is entirely clear that it was not because defendant tendered his answer out of time, nor because the allegations therein contained were insufficient to constitute a good defense to the cause or causes of action alleged in plaintiff's amended petition, but solely because the defendant was assumed by the trial court to be in contempt of a former order to pay temporary alimony and counsel fees, that he was denied the right to answer or further plead, and that judgment was rendered against him as by default.

In this state of the record, there certainly, we think, can be no material difference between the underlying principle involved in the case at bar and that involved in *Hovey vs. Elliott, Supra.*

And think of the inconsistency of the trial court's solemnly declaring in its final decree, "that the said defendant, A. W. Bennett, is now called three times in open court but makes default and fails to plead or otherwise appear in said cause" when, by its own order made only a few days before, said defendant had been denied the right to file an answer, or other pleading, because assumed to be in contempt of court, though no steps whatever had ever been taken against him in any contempt proceeding. If defendant were guilty of such contumacious conduct as not to be entitled to be heard, why go to the useless trouble of having him "called three times in open court" before adjudging him in default.

In attempting to show that the fundamental question determined by this court in *Hovey vs. Elliott* rests upon a different principle from that involved in the case at bar, the lower court says, in part:

"In this case defendant had never been in court, but had wilfully refused to appear therein, or to give the slightest heed to the proceedings therein. In that case the defendant was asking no favor or indulgence of the court. In this case he is in default, and moving the court to grant him both favor and indulgence, to-wit: leave to appear and answer out of time, because of his wilful refusal to appear when summoned. In that case

the order was to punish the contempt. In this case the order is a condition to granting a favor." (R. p. 65.)

Waiving, for the time being, the erroneous assumption of facts contained in the foregoing statements, we cannot believe that the substantive, we may almost say sacred, rights of a party to be heard in defense before being subjected to the liability of a heavy money judgment, or deprived of his property by judicial decree, are hinged upon such a flimsy technicality as that urged by the Oklahoma Supreme court in attempting to distinguish, on principle, the action of the trial court in the case at bar, from that condemned by this court in *Hovey vs. Elliott*. It is certain that the practical effect of the ruling in each case is the same, that is, to deprive the defendant of his property by a so called judicial proceeding without his having an opportunity to be heard. And the motive which prompted the action of the trial court in each case was the same,—to punish defendant for his alleged contempt by depriving him of an opportunityy to defend the action, or to coerce such defendant into compliance with the former order.

The holding of many courts and text writers to the effect that a couurt of equity will not grant a party any favors who has been legally adjudged in contempt, because of his wilful refusal to obey a proper order, means only that such party will not be granted any affirmative relief in the action until he has purged himself of such contempt, and not that he will be deprived of making any defense which he may have to plaintiff's cause of action because his answer may be tendered out of time, especially so when his default in not filing an answer within the time prescribed by statute is only nominal, as in the case at bar. This distinction is clearly recognized in Hovey vs. Elliott, *supra,* in the holding that: "The power of a court to deny a favor to a person in contempt does not include the power to refuse to a person in contempt the right to defend in the principal cause on its merits," and the cases cited and quoted from therein fully support the conclusion reached. From these citations and quotations, we select the following as illustrative of the distinction contended for:

"The cases of *Phillips vs. Bucks* (1683), i Vern, 228;

Roper v Roper (1688), 2 Vern 91, and *Maynard v Prumfret* (1746) 3 Atk. 468, do not discuss the ordinance of Lord Bacon, but touch upon the question of the right of a defendant in contempt to be heard. In the first case cited, the reporter in a marginal note, alluding to a defendant who was in contempt *for failure to appear or answer*, says: "One of the defendants is in contempt, and stands out to a sequestration and the cause is heard against the other defendants; yet he may come in and answer, and the cause may be heard again as to him."

"A further indication that the rule was not understood to operate to deny to a defendant a hearing upon matters of strict right is shown by the case of *Cook vs. De Montmorency*, 1. Hog. 181, where it was held that though a party was in contempt, *he might notwithstanding apply for and obtain time to answer the bill*, and an order on the plaintiff to stay the entry of process in the meantime."

"In *Oldfield v Cobbett* (1845) 1 Phil. Ch 613, it was held, among other things, that a party who is in contempt for non-payment of costs in a suit is not thereby prevented for moving for leave to defend it *in forma pauperis.*"

"In *Haldane vs. Eckford* (1869), L. R. 7 Eq. 425, it was held that although a defendant is in contempt, not for non-payment of costs, but for non-compliance with orders of the court, he is entitled to take any step required for the purposes of his defense. The report of the case (p. 426) reads as follows:

"The vice-chancellor said that although the contempts committed have been of the most flagrant kind, as these documents were required by the defendants for the purpose of defending themselves, *he had no jurisdiction to refuse the order.*"

"In *Chatterton vs. Thomas* (1866 36, LJ. Ch. 529, a plaintiff in contempt was held to be at liberty to proceed with the cause in the ordinary way and a special order for leave to amend was granted to him."

If a plaintiff, though in contempt, is entitled "to proceed with the cause in the ordinary way," and to an

order granting him leave to amend, as a matter of right, surely a defendant should be entitled, as of right, to file his answer out of time, if offered before a default has actually been entered against him. See also *Mead vs. Norris*, 21 Wis. 310.

In concluding the opinion upon this branch of the case, Mr. Justice White, speaking for the court, in *Hovey vs. Elliott*, says:

"Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permite one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us."

In *Hovey vs. Elliott*, defendants could have pre-

vented the striking of their answer by complying with the former order of the court made after due notice by rule to show cause and full opportunity to be heard before being adjudged in contempt. In the case at bar, defendant had leave to file his answer upon complying with the former order made by the trial judge at Chambers, several months before, for a violation ~~for~~ of which no contempt proceedings had ever ben commenced. Wherein then is defendant's position in this case less favorable than that of defendants in the former?

Without the personal service of the *alias* or second summons upon defendant, plaintiff certainly could have recovered no personal judgment for permanent alimony and counsel fees against him on the cause of action alleged in her amended petition, yet, after having been summoned to appear and answer, defendant was denied the right to file his answer in said action, or to make any defense thereto, and a personal judgment was thereafter rendered against him by default for $6,000 permanent alimony and $500.00 counsel fees. And this action of the trial court is affirmed by the court below

on the sole ground that, because defendant, (by first appearing specially and filing a motion to quash the service of said summons) failed to file or tender his answer within the time prescribed by statute, the trial court had legal authority to impose upon him practically any burden it saw fit, as a condition precedent to the filing of such answer. We think this rule not only too harsh, but also entirely too dangerous, to become a fixed one in any American jurisdiction and, further, that it falls clearly within the following language of this court, per Mr. Justice Field, in *Windsor vs. McVeigh*, 93 U. S. 277, to-wit:

"Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons for him to appear and speak, if he has anything to say, why the judgment should not be rend-

ered. A denial to a party of the benefit of a notice would be in effect to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and when he has appeared saying. Your appearnce shall not be recognized and you shall not be heard."

Furthermore, if it be conceded that defendant was legally in contempt, simply because of his failure to comply with the order of the trial judge to pay temporary alimony and counsel fees, made on May 23, 1903, and without any proceedings to have him so adjudged, it is evident that his contempt existed at the time the plaintiff filed her amended petition (July 24, 1903), and at the time she caused the *alias* summons to be issued thereon and served upon defendant (Feb. 17 and 18, 1904.) *Query*: Under the rule announced by the Oklahoma Supreme Court, would defendant at any time, have been entitled to answer this amended petition without having first purged himself of such contempt? If so, at what particular time would he have been entitled to do so? If not, he is clearly *civiliter mortuus*, in this action, until he has so purged himself. It will be observed that defendant is given no alternative but com-

pliance with said former order as a condition precedent to the filing of his answer, as shown by the order made on April 6, 1904. (R. pp. 42-43.)

In attempting to distinguish the case of Foley vs. Foley (Cal.) 52 Pac. 122, from the case at bar, the court below, after quoting a paragraph from the opinion in that case showing that defendant had filed a demurrer, which was stricken from the files on plaintiff's motion, and judgment thereupon rendered against the former as by default, says:

"It will thus be seen the defendant in that case was not in default but was in court in proper time and standing on his legal right, asking no favor of the court beyond what the law gave him, and that those were arbitrarily brushed aside on the theory of thereby punishing him for contempt. In the case at bar defendant was never in court, save to ask leave of the court to file an answer out of time and this request was granted, and he was given seven days in which to file his answer, on condition that he now comply with the former order of the court." (R. p. 67.)

As already seen, defendant in the case at bar had made a special appearance and challenged the legality of the service of the *alias* summons by proper motion for that purpose, which was heard upon its merits and overruled by the trial court (R. p. 42); consequently,

the only material difference between the Foley case and this is that the demurrer in that case was stricken from the files instead of having been heard by the court and overruled, for, under the usual practice, a defendant who has interposed a demurrer to a petition, which is subsequently overruled, and then asks leave to answer, is as much in default as if he had first interposed a motion challenging the jurisdiction of the court. 6 Enc. Pl. and Pr. 262, and cases cited in Note 2. But the discretion of the court to impose terms or refuse the answer is not an arbitrary one. *Thornton vs. Borland,* 12 Cal. 138; *Rose vs. Perkins,* 9 Neb. 304, 2, N. W. 715; *Corson vs. Neatheny,* 9 Colo. 212; 2. Pac. 82; *Wyckoff vs. Bishop,* 98, Mich. 355, 57, N. W. 170. It certainly is not such a discretion as to authorize the court to refuse defendant permission to answer out of time as a punishment for an alleged contempt.

Furthermore, an examination of the Foley case discloses that the rule there laid down is not based upon any such technical distinction. After strongly intimating that the power of the courts of California to

punish for contempt is limited by the code to fine and imprisonment, the court then says:

"But independently of the effect of our statute, we are satisfied that these cases would clothe that court with an extent of power, which it has never rightfully possessed. While the general remedial power of a court of equity to take all proper measures to coerce respect and obedience to its lawful orders has always been recognized to the extent that a party in default may justly be denied the right to have any affirmative action of the court sought by him, until he shall have purged himself of this contempt, that power has never extended to a point that would authorize a denial to a party of the right to be heard in defense to any affirmative judgment proposed to be taken against him whereby he would be deprived of any substantitive right of person or property."

The California Supreme Court then cites with approval the case of Hovey vs. Elliott, and, commenting thereon, further says:

"And it is there expressly declared that even in a court possessing plenary power to punish for contempt, untrammeled by statute, the power does not exist and never has, to summon a defendant to answer, and, after obtaining jurisdiction, refuse to allow him to answer, or strike his answer from the files and condemn him without a hearing on the theory that he has been guilty of contempt of the court. And this is put upon the broad fundamental ground that such action is violative of a constitutional right of a citizen to be heard before being deprived of his property or personal rights, and would amount, in effect, to a taking of his property, without "due process of law" since that term, if it means anything, signifies a right to be heard in one's own defense."

The principles enunciated by this court in Hovey vs. Elliott, *supra*, have been fully approved by several of the State Supreme Courts, among them being, in addi-

tion to Foley vs. Foley *supra*, that of Greig vs. Ware, (Colo.) 55. Pac. 163 wherein it is held that:

"So the next question to consider is the authority of the trial court as a penalty for such failure, to order his pleadings stricken from the files and proceed to hear the cause upon its merits without permitting him to offer evidence, although allowed the privilege of cross-examining the witnesses produced by defendants. In the former opinion filed in this court it was held that the court could enforce obedience to its order, requiring a new bond, in the manner it did. Upon petition for rehearing by plaintiff in error, the correctness of this holding is challenged. A further examination of the authorities cited in support of the ruling made on this question and, especially of *Hovey vs. Elliott*, 17 Sup. Ct. 841, where the authorities cited in our original opinion and others on the same subject are exhaustively reviewed, we conclude that while the court has the inherent power to enforce obedience to its orders, under pain of a proper penalty, it has not the authority to punish a party for disobedience to such orders, in a manner which results in depriving him of a trial of the cause, in which such orders are made, upon its merits."

See, also, on the question under consideration, *Kruegel vs. Nash* (Tex.) 70 S. W. 983, wherein it is held that; "A party cannot be punished for contempt in filing a scurrilious motion, by forbidding him to further appear or file any other pleading or paper;" *Wiggins vs. Commonwealth*, (Ky.) 42 S. W. 1106, wherein it is held that:

"Affidavits attempting to show that the appellant and his friends had kept the prosecutrix from attending the trial show, at most, but contempt of court which did not authorize the court to render judgment against him on a claim, the merits of which had not been tried."

To the effect that the principle we are contending for applies with even greater force to actions for divorce, or divorce and alimony, than to other classes of action, see *Bachelor vs. Bachelor* (Wash.) 71 Pac. 193 and cases therein cited:

In the opinion of the court below in the case at bar, it is further said:

"It is not claimed that the condition which the court attached to granting him the favor asked was onerous, unreasonable or impossible of performance by defendant, and therefore an abuse of discretion; neither was any answer tendered in the case, nor any claim presented to the court in any form demanding the right which is now for the first time presented by the defendant. Had the claim which is now presented in this court and urged with so much tenacity been presented to the court below, it may well be that the trial court would have modified the conditions attached to leave to answer, or have granted the leave without condition.

Only in extraordinary cases will this court reverse the order or ruling of a trial court, where the question upon which the reversal is sought was never submitted or suggested to the court." (R. p. 67.)

In answer to the first proposition suggested in the foregoing quotation it will, we think, suffice to iterate that defendant had never been cited to show cause why he had not complied with said former order and that it is both in violation of an express provision of the Oklahoma Statutes and beyond the power of the trial court

to impose such a condition precedent to the filing of said answer, as a punishment for this alleged contempt.

As to the statement that, "Neither was any answer tendered in the case" we, again, call especial attention to the fact that the order of April 6, 1904, shows that defendant, "by his attorneys offered to file his answer in this cause, instanter, which said offer was refused," etc., (R. p. 42.) Thus clearly implying that said attorneys had an answer prepared and ready to file. But, in asmuch as the trial court held that (in no event) would defendant be entitled to file said answer until he had purged himself of the alleged contempt, what possible legal difference could it make as to whether his attorneys had an answer prepared and ready to be filed at that particular moment or not?

We answer the next proposition therein suggested by the counter inquiry of how could the Oklahoma Supreme Court know what arguments were made by counsel for defendant in support of the application to file his answer, inasmuch as the record only shows that the answer was offered by counsel for defendant, object-

ed to by counsel for plaintiff, and leave to file same refused by the trial court until said former order had been complied with. This certainly lays a sufficient foundation for presenting and arguing to the appellate court any legal reason tending to show that the trial court erred in refusing to permit the answer to be filed, as it is neither required, nor usual, to incorporate the arguments of counsel before a trial court in the record whereby the cause is carried to an appellate court for review.

The court below further says, in its opinion, that:

"In view of the financial condition of the defendant, we do not think that the terms imposed upon the plaintiff in error as prerequisite to filing his answer, were unreasonable or burdensome for defendant to have complied with." (R. p. 67.) Again, we say, how could the Supreme Court of Oklahoma know the financial condition of the defendant from the record before it, in the case at bar, except upon the theory that said court assumed the allegations of the plaintiff's amended petition to be true. The fact that he was not permitted to con-

trovert any of these allegations is the very thing that the defendant was complaining of in that court, whereas, it assigns, in effect, his failure to controvert these allegations as one of the reasons for affirming the judgment against him. Had he been permitted to controvert, by answer, the allegations made by the plaintiff as to his financial condition, and to introduce evidence in support of such answer, he might possibly have been able to show that, at least, some of said allegations are not well founded.

For the reasons hereinbefore assigned, we respectfully submit that the judgment of the court below in so far as it affirms that portion of the judgment of the District Court of Lincoln county, Oklahoma, awarding plaintiff therein $6,000.00 permanent alimony and $500.00 attorney's fees, should be reversed.

JOHN W. SHARTEL,

JAMES R. KEATON,

FRANK WELLS,

For Plaintiff in Error and Appellant.

Office Supreme Court, U. S.
FILED.
JAN 10 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 98.

A. W. BENNETT, PLAINTIFF IN ERROR AND APPELLANT,

vs.

SARAH GRACE BENNETT.

REPLY BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
Counsel for Plaintiff in Error and Appellant.

(20,363.)

SUPREME COUR OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 98.

A. W. BENNETT, PLAINTIFF IN ERROR AND APPELLANT,

vs.

SARAH GRACE BENNETT, DEFENDANT IN ERROR AND APPELLEE.

REPLY BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

Counsel for defendant in error and appellee devote the major part of their brief in arguing, under various headings, that, on the record made in the case at bar, the question which plaintiff in error and appellant seeks to have reviewed by this court is not properly presented for its consideration, which argument also necessarily includes the proposition that said question was not properly presented to the court below, notwithstanding the fact that said court, in the face of a similar contention, held, in effect, that such question was properly presented for its consideration by deciding same upon its merits, saying, among other things (in addition to the quotations contained in our original brief), that—

> "The case has been elaborately argued by counsel in their briefs, and we have, therefore, devoted to it

> more than ordinary attention, and have very carefully examined the cases cited and relied upon by the plaintiff in error" (R., p. 61).

The foregoing statements suffice to show that the question presented to the court below by proceedings in error from the District Court of Lincoln County was not only decided upon its merits, but was given a very careful consideration. From the opinion handed down by that court, it is apparent either that counsel for defendant in error therein did not challenge the sufficiency of the record, or, if so, that the court, in effect, denied same by deciding the cause on its merits. In either event said counsel are in no position to ask this court to refuse to consider the question on its merits, because not properly preserved in the record.

Under the third subdivision of their brief, counsel for defendant in error and appellee in this court contend that, inasmuch as there was only general findings of fact made by the court below, or the District Court of Lincoln County, this court cannot review them. We submit that the question involved is not one of fact at all, but entirely one of law arising upon an undisputed state of facts and clearly shown upon the face of the record, and which may be concisely stated as follows:

Had a district court in the Territory of Oklahoma, especially in a divorce and alimony case, legal power and authority to refuse to permit the defendant to answer or defend as a punishment for his failure to comply with a previous order requiring him to pay certain sums as temporary alimony and attorneys' fees, and without any steps having been taken against him in a regular contempt proceeding?

In Moline Plow Co. *vs.* Webb & Bros., 141 U. S., 616 (35 L. Ed., 879), it is said by this court that—

> "Although the record recites that the case was heard upon the pleadings and evidence, it does not appear that any oral testimony was introduced. No bill of exceptions was signed and the finding by the

> court was general, stating only its conclusions of law. The defendant, therefore, contends that there is nothing before the court for review. This position cannot be sustained. * * * If this is error it is one apparent on the record and need not have been presented by a bill of exceptions."

In the fourth subdivision of their brief said counsel contend that, inasmuch as no bill of exceptions is contained in the transcript of the record, no errors committed by the trial court or the court below are saved. The Oklahoma Statute provides that—

> "The record shall be made up from the petition, process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments and *all material acts and proceedings of the court*," etc. (Wilson's Rev. Stat. (1903), sec. 4606).

This section is contained in the Code of Civil Procedure, which was adopted by the Legislature of the Territory of Oklahoma in 1893 from the statutes of the State of Kansas as revised in 1889. Said section had been repeatedly construed by the Supreme Court of that State prior to its adoption by the territorial legislature.

> "Our Code of Civil Procedure having been adopted from the State of Kansas, this court will follow the principles of construction and interpretation which have been applied to it by the Supreme Court of that State" (United States *ex rel. vs.* C. O. & G. R. R. Co., 3 Okl., 404).
>
> See, also, Vaughn Lumber Co. *vs.* Missouri Mining & Lumber Co., 3 Okl., 174; Yarnell *vs.* Kilgore (Okl.), 82 Pac., 990.

In Randolph *vs.* Hudson, 74 Pac., 946, the Oklahoma Supreme Court further says on the question of the effect of adopting a construed statute from another State or Territory:

> "We take the rule to be well established that where a statute is adopted by the legislature of one State

> from the statutes of another State or Territory, it is adopted with the construction put upon it by the Supreme Court of the State or Territory from which it is taken prior to its adoption. This doctrine was recognized by the Supreme Court of the United States in the case of Stutsman Co. *vs.* Wallace, 142 U. S., 312; 12 Sup. Ct., 233; 35 L. Ed., 1018, where Chief Justice Fuller, delivering the opinion of the court, uses the following language: 'The known and settled construction of a statute of one State will be regarded as accompanying its adoption by another.'"

And in Schiver *vs.* Territory, 74 Pac., 901, said court goes to the extent of expressly overruling two previous cases on the ground that they were in conflict with the construction that had been given a statute adopted from California by the Supreme Court of that State, saying:

> "At the time these decisions were rendered our attention had not been called to the California and Dakota adjudications, and we now deem it our duty to follow the construction given our criminal code by the States from which we take it, and which our legislature evidently adopted."

As hereinbefore stated, the Supreme Court of Kansas had repeatedly construed this section prior to its adoption in Oklahoma, holding in Leavenworth L. & G. Rld. Co. *vs.* Comm'rs Douglas Co., 18 Kan., 169, that—

> "A motion to require a pleading to be made more definite and certain is a part of the record and need not be incorporated in a bill of exceptions."

In discussing this question Mr. Justice Brewer, speaking for the court, says in part:

> "In McCullagh *vs.* Allen, 10 Kas., 150, we held that a motion for a new trial becomes, when filed, a part of the record and need not be incorporated in a bill of exceptions. And this was but a recognition of the general practice already prevailing in the State.

True, the motion is not generally entered upon the journal. Neither are the pleadings. But the judgment based upon the pleadings, and the order made upon the motion must be (Gen. Stat., 707, sec. 414; page 765, sec. 705). And can there be any doubt that the pleadings are part of the record? Again, the law of 1862 required a final record in every case, unless waived; and the laws of 1868 provide for one when ordered by the court (Comp. Laws of 1862, p. 189, sec. 400; Gen. Stat., p. 707, sec. 415). This "record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments and all material acts and proceedings of the court. * * * Evidence must not be recorded (Gen. Stat., p. 707, sec. 417). The words, 'all material acts and proceedings of the court' are broad enough to include motions to reform the pleadings. Indeed, it may be stated as a general proposition that the spirit and tendency of our code of procedure, civil and criminal, is to get onto, and make a part of the record, as much of the proceedings as possible. Notice the provisions as to instructions, and the number of journals and dockets. We conclude, then, that the motion and the ruling of the court thereon are properly before us for consideration" **(p. 177).**

See, also, Bank of Kansas City *vs.* Mills, 24 Kan., 431 (434).

It is manifest from the foregoing citations that the Supreme Court of Kansas holds that the language of said section is broad enough to include, as parts of the record proper, all motions and rulings thereon, and that this construction, in legal effect, became an integral part of its provisions when the territorial legislature adopted our civil code from that State.

Now, even conceding that the Oklahoma Supreme Court laid down a somewhat different rule in Menten *vs.* Shuttee, 11 Okl., 381; 67 Pac., 478, cited by opposing counsel, it is evident (from an examination of that case) that the court's

attention was not called to the construction which had been given this section prior to its adoption into Oklahoma, and also that the holding in that case on this question of practice is not applicable to the case at bar.

It is also evident that the interpretation given this section by the Supreme Court of Kansas is undoubtedly the correct one, if reasonable force and effect is to be given the language contained therein.

Furthermore, the error complained of, both here and in the court below, appears upon the face of the judgment rendered by the trial court, as well as in the signed order made at the time counsel for defendant offered to file his answer, *instanter*. As shown in our original brief, the judgment both for divorce and for permanent alimony and counsel fees was rendered as by default, the trial court stating therein that defendant was "in default for an answer and not entitled to answer or plead until he shall comply with the order heretofore made," etc. (R., p. 45). It is thus seen that this final decree shows on its face, not only that defendant was adjudged to be in default, but also that he was denied the right to answer or otherwise plead to the petition as a punishment for his alleged contempt, or to coerce him into a compliance with the former chambers order. In other words, for the reasons stated in the decree, he was denied all right to plead to or defend the action, either as to the claim for divorce or as to that for permanent alimony, including counsel fees. It is from this final judgment that the proceedings in error have been prosecuted, and it has been repeatedly held by the Supreme Courts of both Kansas and Oklahoma that, where an error in a judgment appears on the face of the record proper, the court will consider and correct it, although no exception was taken thereto in the trial court (Koehler *vs.* Ball, 2 Kan., 160; Lender *vs.* Caldwell, 4 Kan., 339; Wilson *vs.* Fuller, 9 Kan., 176; Coburn *vs.* Weed, 12 Kan., 182; Territory of Oklahoma *vs.* Caffrey, 8 Okl., 193; Caffrey *vs.* Overholser, 8 Okl., 202. See also Commercial Bank *vs.* Buckingham, 12 O. St., 402).

In Lee *vs.* United States, 7 Okl., 558, it is also held that—

> "Where the errors complained of appear on the face of the record proper, although they be errors of law occurring during the progress of the trial, no motion for a new trial or a bill of exceptions is necessary to precent them for review."

However, there is no question but that the previous order of the trial court, made in open court and signed by the judge on April 6, 1904, is rightfully a part of the record proper under the plain provisions of said section 4606; hence the ruling therein set forth is properly presented for review by a transcript. There is nothing in the language of this section to indicate that only certain orders were intended to be made parts of the record proper any more than that only some verdicts or some judgments were intended to be so included therein.

The ruling complained of by defendant, and duly excepted to, is not only contained in an order of the court, regularly made, signed, and recorded, but would also clearly constitute a part of the record as being a material act or proceeding of the court, when fully noted by the clerk in the proper court journal, as was done in the case at bar (R., p. 43).

It is a well-settled principle of law that all errors shown by interlocutory orders of the trial court are reviewable on appeal or proceeding in error from the final judgment (Jones *vs.* Chicago & N. W. R. R. Co., 36 Ia., 68; Wallace *vs.* Middlebrook, 28 Conn., 464; Luttrell *vs.* Martin (N. C.), 17 S. E., 573; Hulme *vs.* Diffenbacher (Kan.), 36 Pac., 60; Connor *vs.* Wilke (Kan.), 41 Pac., 71.

See also Buckingham *vs.* McLean, 13 Howard, 150 (14 L. Ed., 90), wherein it is held that—

> "The appeal in equity brings up all the matters which were decided in the circuit court to the prejudice of appellant, including a prior decree of that

> court from which an appeal was then taken, but which appeal was dismissed under the rules of this court."

In Dronillard *vs.* Whistler, 29 Ind., 552, it is held that—

> "Where judgment in attachment is rendered by default, the Supreme Court will, on appeal, consider any errors in the proceedings below as the defendant had no opportunity to make objection there."

As we interpret the cases of Young *vs.* Martin, 75 U. S., 354 (19 L. Ed., 418), and Salina Stock Co. *vs.* Salina Creek Irrigation Co., 163 U. S., 109 (41 L. Ed., 90), so strongly relied upon by opposing counsel, they really, so far as applicable thereto, support our position on the question of practice raised by said counsel. For instance, it is shown in the statement of facts set out in Young *vs.* Martin that "the court below entered a decree dismissing the appeal; whereupon the plaintiff sued out this writ of error;" and in Salina Stock Co. *vs.* Salina Creek Irrigation Co. it is said that "we are, therefore, asked to review a final decree of the Supreme Court of the Territory of Utah in an equity case on a question of practice."

In the case at bar the court below not only decided the question urged as ground for reversing the judgment of the trial court on its merits, but say that "we have, therefore, devoted to it more than ordinary attention." Consequently we submit that the entire argument of counsel to the effect that this court should not disturb the decision of a territorial Supreme Court on a question of practice utterly destroys their contention that the case at bar should be dismissed or the judgment of the court below affirmed on the ground that the question pressed by us is not saved by a proper record. And, if the ruling complained of is so preserved, this court will review it and correct any errors involved therein, no matter whether shown by a mere transcript of the record, by a bill of exceptions, or by a case-made (Young *vs.* Martin, *supra*).

That the entire findings, rulings, and decisions of the trial court on the question under consideration, together with its reasons therefor, are fully set out in the record as presented both here and to the court below, cannot be disputed; hence the only contention of counsel in this regard is that, notwithstanding these matters are fully apparent on the face of the record, such record was not properly made under the practice obtaining in the Territory of Oklahoma. In this, as we have hereinbefore abundantly shown, they are clearly in error.

We regard the fifth contention of counsel for defendant in error and appellee as being so palpably untenable as to need no argument in reply. After defendant in the trial court had been refused permission to file an answer or other pleading because assumed to be in contempt, and final judgment had been rendered against him as by default, it would have been quite puerile (if not silly) for him to have gone back to that court asking permission to file a motion to vacate the order and decree of which he complains. Is it to be presumed that the trial court would have been any more willing to let him plead to the merits of the action and be heard in defense thereof after final judgment than it was before? Such a proceeding is neither required nor usual under the Oklahoma Code.

We come now to the sixth and principal contention of opposing counsel, wherein they seek to justify the action of the trial court. After citing certain sections of the Oklahoma Civil Code relating to pleadings they say, on page 27 of their brief:

> "Thus it appears that defendant should have proffered a written statement, in the form of an answer, setting forth the facts constituting his claim or defense. That he utterly failed to do; neither did he show any reason or excuse for the failure."

From the fact that defendant's counsel in that court "offered to file his answer in this cause *instanter*" we have

naturally inferred that they meant a written statement of his grounds of defense, as we have never known of a verbal statement being filed as a pleading. It is also evident from the opinion handed down that the court below indulged in the same inference, and we think this court may safely do so. In fact, as stated in our original brief (pages 20-21), no point was made in the trial court, either by the presiding judge or counsel for plaintiff, as to the sufficiency of the answer tendered by defendant. On the contrary, an entirely different reason why he was not permitted to file same is fully set out in the order denying him this right and in the final decree, and the reason thus assigned forms the basis of the error complained of. It is also shown that the district court "made the further order that the said defendant be permitted to file said answer within five days, on condition that he purge himself of said contempt by complying with said order within that time" (R., p. 42). If this answer had not been in proper form, or had been insufficient otherwise, that court surely would have said so and would as surely have refused to grant defendant leave to file same on any condition.

Again, as already repeatedly shown, said court determined in its final decree that, because of defendant's alleged contempt, he was not only in default for answer, but was "not entitled to answer or plead until he shall comply with the order heretofore made," etc. Is it not asking this court practically to ignore these undisputed facts, for plaintiff's counsel to insist that the judgment in the case at bar should be affirmed on the ground that defendant proffered no sufficient answer, or that he could have fully and properly defended the action without filing an answer or other pleading? It is impossible to interpret that portion of the trial court's decree showing defendant to be in default and not entitled to plead as meaning other than that he was not entitled to be heard or otherwise to participate in the trial of the cause without compliance with the former chambers order. Section 4558 (Okl. Stat. 1893), quoted by counsel

for plaintiff (Brief, p. 29), means no more than to remove, in divorce cases, the disqualification of husbands and wives as witnesses against each other, prescribed by the third subdivision of section 4213 of said statutes, and does not, in the slightest decree, support the contention that defendant might have introduced all his testimony though in default for answer.

It is doubtless true, as contended by said counsel, that, under section 4556 (Okl. Stat., 1893), the trial court was bound to hear evidence in support of the allegations of plaintiff's amended petition before granting a divorce or giving judgment for permanent alimony, but this makes the error committed in rendering such judgment against defendant by default no less grievous. So would the court have been compelled to hear evidence in support of the allegations of the plaintiff in an action of tort before awarding damages against the defendant therein, though in default for answer; but this fact would make such judgment no less one by default.

But why consume further time in discussing this phase of the question when the final decree of the trial court in the case at bar shows conclusively that it was rendered by default, and that this was done because of the alleged contempt of defendant in failing to comply with a former order; and also that, for said reason, he was not entitled to answer or plead, which (as before stated) certainly means that he was not entitled to be heard in defense of the action. This point would not possibly have been more clearly presented had defendant filed his answer in proper time and same subsequently had been stricken from the files by order of court.

After quoting section 3984 (Okl. Stat. 1893), counsel for plaintiff say:

> "Thus we show that the defendant was obliged to answer the demurrer within twenty days after the return day, and that the court might, in its discretion, and upon such terms as might be just, allow the

answer to be made * * * after the time limited. * * *

"It is clear that the trial judge, by the order which is here attacked, kept himself clearly within the provisions of the statute. Defendant had neither answered at the time or times named, nor had he complied with the order of the court. He was in default nearly a year" (Brief, pp. 28–29).

In stating that defendant had been in default for nearly a year, they seem to overlook the facts that the judgment complained of was rendered on the amended petition, and that the only portion of said judgment which is reviewable by this court is that awarding permanent alimony and counsel fees (Sims *vs.* Sims, 175 U. S., 162), which is a personal one and could only be legally rendered upon personal service of summons (Pennoyer *vs.* Neff, 95 U. S., 714 (24 L. Ed., 565); Wesner *vs.* O'Brien (Kan.), 44 Pac., 1090).

However, as before seen, neither counsel for plaintiff nor the trial court made any point against the filing of defendant's answer because it was tendered out of time. In fact, the court specifically waived this point by granting him still further time within which to file same, providing he purged himself of the alleged contempt in the meantime.

How, then, is it possible to place this case on a different legal footing, in principle, from those wherein answers or other pleadings have been seasonably filed and subsequently stricken? Is it any more just to impose an illegal burden upon a defendant as a condition precedent to the filing of an answer out of time than to impose such burden as a condition precedent to his right to proceed to trial on an answer filed within time? We think not. The very section relied on by opposing counsel only authorizes the court to impose "such terms as may be just" as a condition precedent to the allowance of "an answer or reply to be made * * * after the time limited by this act." The rule is that parties are entitled to be heard before judgments are taken against them,

and it is ever an abuse of discretion for courts to hamper this right by the imposition of unjust conditions (6 Enc. Pl. & Pr., 819 *et seq.* See also Bachelor *vs.* Bachelor, 71 Pac., 193).

Recognizing this rule, said counsel argue in effect that, while the trial court was justified, in the exercise of a sound discretion, in refusing to allow defendant to answer or plead to the amended petition of plaintiff, yet it could not have refused him the right to give his own testimony and to introduce other witnesses in defense of the action, had he sought to do so (Brief, pp. 30-31). This is certainly a novel theory of the Oklahoma practice in divorce and alimony cases and one which we believe has never been followed or even suggested by any member of the bench or bar of that jurisdiction. If correct, it would necessarily lead to the result of eliminating answers in all divorce and alimony cases. Why would a defendant put the plaintiff on notice of the character of his defense by setting same out in his answer, if he could just as well introduce all his proof at the trial without filing such pleading?

After quoting an excerpt from the opinion of this court, per Mr. Justice Miller, in Packet Co. *vs.* Sickles (19 Wall., 611), said counsel say:

> "The learned justice then went on to state that the party assigning error on such rulings should be bound to exhibit in his bill of exceptions so much of the rule or rules as affects the question. In the case at bar there is a rule for the particular case stated in the order of the court. The rule appears to be reasonable, just and proper. If there had been any facts in existence which made it clear that the trial court should not make the rule or order they should have been exhibited in a bill of exceptions, and not being so exhibited, this court is bound to refuse to review the action of the court below" (Brief, pp. 31-32).

The basic error of their entire argument under this head is well illustrated in these passages, wherein they assume that it is the rule or order of the trial court prescribing the

time within which defendant might file his answer that is complained of instead of the burden imposed as a condition precedent to his being allowed to file same at all. The difference between the two propositions is manifest and fundamental. Of course, any reasonable rule or order of a trial court prescribing the time and manner in which a pleading shall be filed will be upheld by an appellate tribunal; but this is quite a different matter from that of requiring of the party offering to file such pleading the performance of a condition which is beyond the lawful power of the court to impose, as we claim was done by the trial court in the case at bar. This very distinction is clearly made in the case of Packet Co. *vs.* Sickles, wherein it is said that—

> "The right to plead the statute of limitations, like any other defense, does not depend on the pleasure or discretion of the court. And if the action of the court was rested solely on that ground, we should have no hesitation in reversing it."

In the case at bar the action of the trial court in refusing to permit defendant to answer or defend was rested solely on the ground of his alleged contempt, thus presenting squarely the legality of this action as based upon the reason assigned by that court. We insist that this action, so based, is an unauthorized one for each of the three reasons urged in our original brief, to wit: First, that defendant was never proceeded against for his alleged contempt, as required by the Oklahoma statutes, before he could have been legally adjudged guilty thereof; second, that the power of the court to punish for contempt is limited by said statutes to fine and imprisonment; third, that, independently of these statutory provisions, the court had no legal authority to refuse to permit defendant to answer the cause of action set out in the amended petition of plaintiff, except on condition of his compliance with the court's former order, and, upon his failure

to make such compliance, to render judgment against him by default.

Our contentions on these propositions are not seriously disputed by opposing counsel, but in attempted avoidance thereof they persistently harp on defendant's alleged willful disobedience of said prior chambers order. Conceding all they say about this matter, for the sake of the argument, still it affords no justification for the court's attaching an unauthorized condition to the right of defendant to answer and be heard in a proper defense of the action.

Taking up the case of Hovey *vs.* Elliott, cited and relied upon by us as an authority supporting the third proposition above stated, said counsel argue that the principles enunciated and cases cited therein really support their position on said proposition; yet they admit that "the learned justice (Mr. Justice White) first shows it to be fundamental that the judgment of the court should not be pronounced against a party without hearing him or giving him an opportunity to be heard" (Brief, pp. 33-34). That the Oklahoma District Court pronounced judgment against defendant in the case at bar "without hearing him, or giving him an opportunity to be heard," except on condition that he comply with the former order to pay temporary alimony and attorneys' fees, cannot be controverted. But they say that the cases and authorities reviewed by Mr. Justice White show "that it is within the power of the court to refuse to grant a favor to one in contempt, and to refuse to allow such party to file a pleading until he shall have purged himself of contempt" (Brief, p. 34).

The following language, used by the writer of the opinion in the Hovey-Elliott case, may be considered as fully indicating this court's understanding of the rule established by the English chancery courts and text-writers, to wit:

> "Nowhere in these works is there an intimation that, as a penalty for contempt, a refractory defendant, not in default for answer, might be punished by being disallowed the right to defend against the bill

> filed in the cause. So far from such being the case, as already stated, a party who failed to appear or answer was treated as in contempt, and the various processes for contempt were resorted to in order to compel his appearance and answer; this being done in order that the conscience of the court might be satisfied when it entered a decree in the cause" (p. 421).

After concluding his masterly review of the English authorities, the writer of that opinion further says:

> "The decisions in this country, with two exceptions, which we have, in the outset, referred to, substantially maintain the view we have reached of the question under consideration" (p. 436).

Furthermore, as shown in our original brief (pp. 11-12), no default had been entered against defendant at the time he offered to file his answer, *instanter*, and, as there stated, he was only technically out of time in proffering same (Bachelor *vs.* Bachelor, *supra*).

However, after quoting further from the opinion in Hovey *vs.* Elliott, opposing counsel finally reach the conclusion that the question involved in the case at bar was not adjudicated in that case (Brief, p. 36). While not presented in exactly the same form in the case of Hovey *vs.* Elliott, we confidently assert that the question, as here presented, falls clearly within the controlling principles of that case.

But said counsel have utterly failed to attempt any answer to either of our contentions, to the effect that defendant in the trial court had never been legally adjudged guilty of a contempt, and that (even if he had) the power of said court to punish for contempt is limited by statute to the imposition of fines and sentences of imprisonment. If either one of these contentions is well founded, this cause should be reversed, for it is certain that one must first be legally adjudged guilty of a contempt before he can be legally punished therefor. It is equally true that a court cannot legally

exceed the limitations of valid statutory provisions in imposing punishment therefor upon a person who has been legally convicted of a contempt.

In this connection it is worthy of note that counsel for defendant in error and appellee admit that—

> "The contempt spoken of in the order of the trial court, as well as in other portions of this record, was nothing more than the disobedience of the previous order of the court to pay temporary alimony and counsel fees" (Brief, p. 42).

We again respectfully submit that the judgment of the court below affirming the judgment of the trial court awarding permanent alimony and attorneys' fees should be reversed.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
Counsel for Plaintiff in Error and Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

A. W. BENNETT, PLAINTIFF IN ERROR AND APPELLANT,

v.

SARAH GRACE BENNETT.

No. 98.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

SUMMARY OF THE TRANSCRIPT.

1. Sarah Grace Bennett filed a petition in the District Court of Lincoln County, Oklahoma Territory, May 21, 1903, against A. W. Bennett, asking for a divorce on allegations of "extreme cruelty" of such a shameful character that we do not feel at liberty to repeat even the substance of them in this brief. She also asked for $1,000 temporary alimony to assist her in carrying on her suit and as support for herself, and the sum of $500 for the support of her child. She asked the further sum of $500 attorneys' fees for her attorneys, a just division of defendant's real and personal estate as permanent alimony, that a conveyance made by the defendant to

the son of a former marriage be declared as not affecting any rights that plaintiff had in the property so conveyed, that she be decreed the care, custody and control of the child James Richard Bennett, and that she have such other equitable relief as the court might think just and equitable. See Ok. Stat. (1903), sec. 4543, *et seq.*

The first paragraph of the petition (Rec. 9–13) contains the necessary averments as to her residence and her marriage to the defendant, and it then contains the allegations of extreme cruel treatment that we have alluded to.

The second paragraph of the petition (Rec. 13 and 14) contains averments as to the property of the defendant, both real and personal, in Oklahoma Territory, Indian Territory, and Virginia, aggregating nearly $60,000, and it alleges that the conveyance above mentioned to the defendant's infant son, Harry M. Bennett, was for the sole purpose of defrauding the plaintiff out of any right that she might have in defendant's real estate by reason of the marriage relation, and that the conveyance was without valuable consideration. See Ok. Stat. (1903), Sec. 4548.

2. A summons was immediately issued (Rec. 14, 15) and it was served, May 22, 1903, "by leaving for said defendant at his usual place of residence in said county, a true and certified copy of the within summons, with all the endorsements thereon" (Rec. 15).

3. On the 21st day of May, 1903, the same day the petition was filed, the plaintiff served on the defendant a copy of an application for an order for temporary alimony in the sum of $1,000, and for an order that the defendant be required to pay into court, for the support and maintenance of herself and child, the sum of $500, and the further sum of $500 for her attorneys. That

petition was duly verified (Rec. 16, 17). The affidavit of service (Rec. 15, 16) shows that the person making the service went to the office of the defendant and there served the application upon the defendant by offering to him an exact copy of the application and informing him of the contents thereof, which application the defendant refused to receive. The application and affidavit of service were filed in the District Court, May 25, 1903 (Rec. 16). Two days before that time the application had been presented to Judge Burford, pursuant to the notice (Rec. 17), and that judge had, in chambers, made the order which is copied on Rec. 18. That order directed and adjudged that $1,000 for the use and benefit of the plaintiff as temporary alimony and suit money, and $100 as and for plaintiff's attorneys' fees, should be paid by the defendant into the office of the Clerk of the District Court of Lincoln County within ten days from that date. It was further ordered and adjudged that the defendant "be, and he is hereby, restrained and enjoined from in any manner selling or disposing of or in any manner encumbering any of his real or personal property." The trial court had the right and power to make that order. *McKinnon* v. *McKinnon*, 10 Okla., 400.

4. An amended petition, with lengthy exhibits, was filed by the plaintiff July 21, 1903. The petition contains the necessary averments as to residence and marriage, sets forth the facts constituting extreme cruel treatment in detail, and then sets forth the real and personal property holdings of the defendant in Oklahoma Territory, Indian Territory, and Virginia. It further attacks the conveyance made by the defendant to the son of a former marriage, and alleges that such conveyance was made after the defendant had been informed by the plaintiff that she intended to commence proceedings

to obtain a divorce and recover alimony, and that the conveyance was made on the same day and immediately after being informed of the intention to commence this proceeding, and for the sole purpose on the part of the defendant to cheat, defraud, hinder and delay petitioner in her collection of alimony, suit money, attorneys' fees and maintenance of herself and child. The prayer of the amended petition was for a dissolution of the marital relations, for $1,000 temporary alimony, for $500 as attorneys' fees, and that the homestead described in the petition be decreed to her as permanent alimony, and in addition thereto that she be allowed such other permanent alimony as the court should think right, equitable and just, for the support of herself and child. It also prayed that the conveyances made by the defendant to his son, Harry M. Bennett, be declared void as to the rights of the plaintiff, and that any judgment she might obtain as permanent alimony be declared a lien on the estate described in the petition and subject to the payment of said alimony. The petition also asked that Mrs. Bennett be decreed the care, custody and control of the child, James Richard Bennett, and that she have other and further proper equitable relief. That petition was sworn to (Rec. 24). See Ok. Stat. (1903), sec. 4546, *et seq.*

5. The plaintiff also filed, July 21, 1903, an affidavit for publication (Rec. 33, 34). The notice of publication is set forth in the record, pages 34–36, at length. See Ok. Stat. (1903), sec. 4545. It clearly and definitely states the nature of the proceedings, describes the real estate, and states the nature of the relief asked. The proof of publication will be found at the bottom of Rec. 36. The same notice is copied again (Rec. 37, 38).

6. A guardian *ad litem* was appointed for the minor defendant, September 19, 1903.

7. The transcript contains the following entry from the District Court Journal, dated September 24, 1903, (Rec. 39) omitting the title:

> Comes now the plaintiff and defendant, A. W. Bennett, by their respective counsel, and said defendant submits a motion to set aside service of summons herein, and the court being fully advised: It is by the court ordered—be given leave to amend return on said summons.

This would seem to mean that the defendant, A. W. Bennett, entered a general appearance and submitted a motion to set aside the service of summons.

8. February 17, 1904, an *alias* summons was issued, notifying the defendant, A. W. Bennett, that he had been sued by the plaintiff in the District Court of Lincoln County, and requiring him to answer by March 12, 1904; failing so to do, the petition would be taken as true and judgment rendered accordingly (Rec. 40). That summons was served on the defendant, A. W. Bennett, February 18, 1904, "by delivering to said defendant personally in said county a true and certified copy of the within summons, with all endorsements thereon" (Rec. 41). The summons was directed to the sheriff of Lincoln County, and the service and return were duly made by him. The summons and return were filed February 18, 1904 (Rec. 41).

9. The District Court of Lincoln County convened April 4, 1904, "pursuant to an order of the Supreme Court of Oklahoma Territory" (Rec. 41). The District Court Journal shows that, April 6, 1904, the plaintiff and defendant appeared, by their respective counsel, and the defendant submitted a motion to set aside the service of the summons, which motion the court over-

ruled, and to the ruling of the court the defendant excepted and asked leave to file his answer. The court ordered that "the said request be granted upon condition that said defendant comply with the former order of the court requiring said defendant to pay temporary alimony and attorneys' fees within five days from this date. To which ruling and order of the court the defendant duly excepts" (Rec. 43). On the opposite page of the record appears at length the signed order of the judge. This order shows that defendant's counsel appeared specially and moved the court to set aside the service of the summons, for the reason that it was false and untrue; and to set aside the service of the *alias* summons, for the reason that the same was procured by fraud on the part of the plaintiff; and to have the court declare the notice of publication of no force and effect, so far as the same might affect the personal rights of the defendant, A. W. Bennett, for the reason that the notice of publication was not the proper method of serving the defendant with notice of the filing of the amended petition. The motion was overruled by the court and the defendant excepted. Thereupon the defendant, by his attorneys, offered to file his answer *instanter*, which offer was refused by the court, for the reason that the defendant was in contempt by reason of his failure and refusal to comply with the order of the court previously made, to pay the temporary alimony and attorneys' fees. But the court made the further order that the defendant should be permitted to file his answer within five days on condition that he purge himself of said contempt by complying with the original order within that time. To this order of the court the defendant excepted.

It will be observed that the defendant had appeared generally September 24, 1903, and that April 6, 1904,

he appeared specially. Neither the District Court Journal nor the signed order of the judge shows any of the following:

1. A motion in writing.
2. A proffered answer in writing.
3. A bill of exceptions.

10. April 20, 1904, it was ordered by the court that this cause be set for trial April 28, 1904 (Rec. 43). The case was tried April 29, 1904, on one of the regular judicial days of the regular April, 1904, term of the District Court of Lincoln County. The decree is set forth at length, (Rec. 43), and it is in the form of the usual decree of a court of equity in cases of this character. It finds that the petition was filed by the plaintiff and that the defendant was duly and legally served with summons and had failed to comply with the orders of the court previously made with reference to temporary alimony and attorneys' fees, which order the court finds was served on the defendant Bennett by the sheriff of Lincoln County. The decree then finds that the plaintiff filed her amended petition July 21, 1903, and that thereafter the defendant, A. W. Bennett, was duly and legally served with the *alias* summons by the sheriff of Lincoln County. The court then finds that April 5, 1904, the defendant appeared, by his attorneys, and asked leave to file his answer out of time, which application for leave to answer was refused until he should comply with the former order of the court concerning alimony and attorneys' fees, or show cause why he had not done so, all to be done within five days.

The decree then shows that the case having come on for trial, the plaintiff appeared in person and by her attorneys, the minor defendant appeared by his guardian *ad litem*, and the defendant, A. W. Bennett, having failed to comply with the former order of the court or make excuse for not complying, and having failed to answer

the petition of the plaintiff, was then called three times in open court, but made default and failed to plead or otherwise appear in the cause, and he was then adjudged by the court to be in default for an answer and not entitled to answer or plead until he should comply with the order theretofore made.

The plaintiff and the infant defendant announced that they were ready for trial, a jury was waived and by agreement the case was tried by the court. The plaintiff introduced her evidence and rested. The infant defendant introduced no evidence and rested, and the case was submitted to the court. The decree then finds that the plaintiff is entitled to a decree dissolving the marriage relations existing between the defendant and herself, and that she was entitled to have the care and custody of the child, James Richard Bennett. It finds, also, that the plaintiff is entitled to have and recover from the defendant, A. W. Bennett, the sum of $6,000.00, and Lots 19 and 20, in Block 28, the same being the homestead of plaintiff and defendant, as permanent alimony; that she recover the further sum of $500.00 as fees for her attorneys, and the costs of the action. The decree then finds that the deed made by A. W. Bennett to Harry M. Bennett, May 20, 1903, was without consideration, fraudulent and void as affecting the rights of plaintiff, and that it should be set aside and held for naught and the property described in that deed and the decree should be subject to the payment of the $6,000.00 alimony and $500.00 attorneys' fees and the costs of the suit.

The court then entered the usual decree of divorce and gave the plaintiff the care and custody of the minor child. The court also decreed that the deed executed by A. W. Bennett to Harry M. Bennett was without consideration, fraudulent and void as affecting the rights of the plaintiff,

etc., in harmony with the finding on that point. That was followed by the usual judgment and decree for permanent alimony, and that Lots 19 and 20 be awarded to the plaintiff in fee as her sole and separate property. The court then ordered that the order theretofore made for the sum of $1,000.00 as temporary alimony for plaintiff, and $100.00 as and for her attorneys' fees, be vacated and set aside. Evidently the court did not intend that the record should be interpreted to mean that the defendant should pay those amounts in addition to the permanent alimony and attorneys' fees decreed to be paid the plaintiff by the defendant. See *McKinnon* v. *McKinnon*, 10 Okla. 400.

11. On the same day (Rec. 49), the infant defendant submitted a motion for a new trial, which was overruled. Thereupon he made application for time in which to make and serve "a case made" for the Supreme Court, and the court allowed him 90 days within which to make and serve a case made for the Supreme Court, etc. Subsequently (Rec. 50), thirty days' additional time was given to the infant defendant for making and serving a case made. Next follows the certificate of the Clerk of the District Court of Lincoln County to the transcript of the record. That is followed (Rec. 51) by a notice of intention to appeal on behalf of A. W. Bennett from the decree of the court granting the plaintiff "a divorce from this defendant and decreeing her, the said plaintiff, alimony and suit money and the costs of the suit against this defendant."

Concerning this appeal, the following things will be noticed:

1. The defendant, A. W. Bennett, did not appear and testify or ask permission to appear and testify, nor did he produce witnesses, or offer so to do, as to the merits of the case.

2. He did not appear, specially or otherwise, at the time of trial or adjudication, and note exceptions.

3. He did not file any bill of exceptions.

4. He did not, at the time of trial or adjudication, or at any time, comply with the previous order of the court or proffer an answer in writing.

12. The case reached the Supreme Court of the Territory of Oklahoma by writ of error August 26, 1904. The petition in error is on pages 8 and 9 of the record, and it is predicated entirely on the alleged error of the court in making the order for the payment of temporary alimony and attorneys' fees, and in adjudging A. W. Bennett in contempt of court for failing to comply with the order above mentioned, and in refusing him permission to file his answer in said cause unless he should, within five days from the date of the order, purge himself of contempt of court by complying with the original order for the payment of temporary alimony and attorneys' fees.

13. The opinion of the Supreme Court (Rec. 60–61), is preceded by an unsigned "statement of facts" (Rec. 53–60). This contains little but pleadings, orders, entries and notice of appeal. The Supreme Court of the Territory found no error in the record and affirmed the decree of the court below. The case comes here both by writ of error and by appeal. The petition for the writ of error and the assignment of errors in support of the petition, as well as the order allowing the writ of error, will be found on Rec. 2–4. The petition for allowance of appeal, with assignment of errors supporting it, and the order allowing the appeal, will be found on pages 5–7. Those petitions, assignments and orders were all made and filed July 28, 1906.

ARGUMENT.

I.

Nature of the Case.

The nature of the case is equitable. It was for divorce, and such incidental orders and decrees as courts of equity grant, as well as for a restraining order and decree fixing the plaintiff's rights in certain real estate, and declaring all of the defendant's real and personal property to be subject to such adjudication and decree as the court might enter. All this is clearly of equitable jurisdiction. The trial court possessed equity jurisdiction and powers. Section 9 of the Act of May 2, 1890, 26 Stat. 85, commonly known as "the organic act," after creating supreme and district courts, enacted that:

> The said supreme and district courts, respectively, shall possess chancery, as well as common law, jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the territory affecting persons or property.

Here is a broad grant of general chancery jurisdiction and authority. The relief sought in this case, both singly and collectively, was that which must be applied for in this country to a court possessing equity jurisdiction and powers. The remedies sought here are declarative, restorative, preventive, establishing personal status, as well as the remedies of pecuniary compensation. These remedies are all of equity jurisdiction (1 Pomeroy Eq. Juris. sec. 112, 170).

This court has often recognized the equitable nature or characteristics of divorce proceedings. See especially

Barber v. *Barber*, 21 How. 582–598, where the authorities are reviewed.

II.

Writ of Error or Appeal.

This case has been brought to this court both by writ of error and by appeal. The writ of error does not lie, and this court has no jurisdiction of the case on that writ because the case is one of equity jurisdiction. It should have been brought here by appeal only.

The Oklahoma organic act, 26 Stat. 85, sec. 9, contains the following provision:

> Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Court of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed $5,000 . . .

This sends us to the law governing writs of error and appeals from the circuit courts to this court.

It has been settled for a long time that the decree of a court of equity cannot be reviewed here by writ of error.

The San Pedro, 2 Wheat. 132;
Dower v. *Richards*, 151 U. S. 658, 663, 664;
United States v. *Coe*, 155 U. S. 76, 83;
Elliot v. *Toeppner*, 187 U. S. 327;
Garrazi v. *Dastas*, 204 U. S. 64.

Conversely, the judgment of a court of law cannot be reviewed here by appeal.

Parish v. *Ellis*, 16 Pet. 451;
Dower v. *Richards*, 151 U. S. 658, 663, 664;
Comstock v. *Eagleton*, 196 U. S. 99;
Royal Ins. Co. v. *Martin*, 192 U. S. 149.

In *Dower* v. *Richards*, above cited, it was held that, under section 9 of the Oklahoma organic act, above quoted, this court could only review by a writ of error, a final judgment of the Supreme Court of Oklahoma in an action at law, and the appeal taken in that case was dismissed for that reason.

The divorce cases that have been decided by this court in reviewing the judgments of the territorial supreme courts have been brought here by appeal, such as—

Armijo v. *Armijo*, 181 U. S. 558;
De La Rama v. *De La Rama*, 201 U. S. 303;
Jackson v. *Jackson*, 91 U. S. 122.

In entertaining jurisdiction of these divorce cases on appeal, this court has given its sanction to the view we are here presenting that a case of this kind can only reach this court from the Supreme Court of the Territory of Oklahoma by appeal, and not by writ of error.

Therefore we submit that this court has not acquired jurisdiction by the allowance of the writ of error made by a judge of the Supreme Court of the Territory, and that the case must stand here, if at all, on the appeal.

III.

No Special Findings of Fact.

As the findings of fact are general, this court cannot review them.

We have shown that the Oklahoma "organic act" provides that writs of error and appeals may be prose-

cuted in this court just as from the circuit courts of the United States. The language of the "organic act" makes applicable section 700, Rev. Stat., which was considered in *Lehnen* v. *Dickson*, 148 U. S. 71, 73, and it was held that where the case was tried by the court without a jury, as in the case at bar, and there was no special finding of fact, but a general finding only, this court would accept that finding as conclusive and limit its inquiry to the sufficiency of the complaint and the rulings, if any be preserved, on questions of law arising *during the trial.*

Such findings of fact not being in the record, this court will only review the action of the court below in matter of law, not in matter of fact.

Sturr v. *Beck*, 133 U. S. 541, 546;
Id. &c. Land Co. v. *Bradbury*, 132 U. S. 509, 514.

It will be noted that section 700, Rev. Stat., provides that:

> The rulings of the court in the progress of the trial of the case, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal: . . .

This court in *Lehnen* v. *Dickson* above cited, after quoting from section 700, said:

> Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special finding, there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury.

The court cited *Martinton* v. *Fairbanks*, 112 U. S. 670.

We call attention to the fact that section 700, and the opinion of this court in *Lehnen* v. *Dickson*, limit the rulings that can be reviewed here, if properly preserved, to "*the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions.*" Now, in the case at bar, the errors upon which this writ and this appeal are being prosecuted are predicated on the ruling of the court long prior to the trial of the cause, and such rulings were not preserved by a bill of exceptions. There is a long line of cases holding that, there being no exceptions to the rulings of the court in the progress of the trial, and the findings of fact by the court being general, the record raises no question open to revision in this court. *British Queen Mining Co.* v. *Baker Silver Mining Co.*, 139 U. S. 222, and cases cited.

In *Egan* v. *Hart*, 165 U. S. 188, error to the Supreme Court of the State of Louisiana, it was held that when the facts are found by the court below, this court is concluded by such findings. In that case the court said that in *Dower* v. *Richards*, 151 U. S. 658, heretofore cited by us, the court treated as open for further consideration the question whether in chancery cases the power existed in this court to review the decision of state courts on both the law and the facts, and then said:

> We, however, conclude that not only the very nature of a writ of error, but also the rulings in this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law when the facts are found by the court below, this court is concluded by such findings.

In *Egan* v. *Hart*, this court further said:

> It is likewise settled that on error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the questions presented, and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record.

But in the case at bar the opinion of the court does not state the facts, other than the filing of the notice of the application for temporary alimony and the service thereof on Mr. Bennett; the granting of the order for the temporary alimony by the judge at chambers; the entering of the special appearance for the purpose of moving to set aside the service of the summons, and the request of Mr. Bennett that he be given leave to file his answer and the order denying that request, etc.

The "Statement of Facts" which precedes the opinion of the court in this record (pages 53–60) cannot be considered by this court "for the purpose, not of deciding the facts, but by way of throwing light on the findings," because there are none but the *general findings*.

We submit that there is nothing in this record that can be reviewed by this court either on appeal or on writ of error.

IV.

No Bill of Exceptions.

There is no bill of exceptions in this transcript. The way to save errors that may have occurred before or at the trial is to set them forth in a bill of exceptions, to be signed by the judge and filed.

1. The Oklahoma Code of Civil Procedure (Okla. Stat. 1903) contains the following sections:

> 4192. Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of decision, that he excepts.
>
> 4193. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing, and present it to the judge for his allowance. . . .
>
> 4194. No exception shall be regarded, unless it is material and prejudicial to the substantial rights of the party excepting.

In this case the grounds of the objection *do not appear in the entry*, and therefore the party excepting should have reduced his exceptions to writing and presented it to the judge for his allowance. *Menten* v. *Shuttles*, 11 Okla. 381, and numerous Oklahoma cases there cited.

It does not appear in this record, in any manner or form, that the exception is "material and prejudicial to the substantial rights of the party excepting." Nothing can be held to appear in this record but the bare fact of an exception, if that much.

2. Again, sec. 700, Rev. Stat., as we have seen, requires a bill of exceptions.

As was said by this court in *Suydam* v. *Williamson*, 20 How. 427, 433:

> When a party is dissatisfied with the decision of his cause in an inferior court and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record

> for the opinion of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequences of his own neglect. . . Whatever the error may be and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law.

Then the court laid down the familiar doctrine that the bill of exceptions is the safest method undoubtedly, as it is the most comprehensive one in its operation.

The plaintiff in error or appellant in the case at bar did not comply with the terms of the Oklahoma statute, or with the federal statute, or with the practice recognized as correct by this court. On the contrary, his case here stands on the journal entry written by the clerk and the formal order signed by the judge. Neither states the grounds of the application or the objection.

A practice similar to that adopted by the plaintiff in error or appellant here was indulged in by the plaintiff in error in *Young* v. *Martin*, 8 Wall. 354, 356, a case coming from the Circuit Court of the territory of Utah, and involving territorial statutes quite similar to those of Oklahoma. In that case no bill of exceptions was taken, signed or filed, but in the record were certain journal entries made by the clerk, and they stated in the briefest and most general manner the proceedings had in court. They did not purport to give the particulars of the proceedings, but only to describe their character. They were made to preserve an account of the general order of business of the court and to assist the clerk in the subsequent preparation of the formal record. After stating that much about the record, Mr. Justice Field said:

> These entries do not present the action of the court and the exceptions in such form that we can take any notice of them. It is no part of the duty of the clerk to note in his entries the exceptions taken or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court. To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by the appellate court.
>
> It is true, as stated by counsel, that the object of a bill of exceptions is to make matter of record what would not otherwise appear as such, and that no bill is necessary where the error alleged is apparent upon the record.

Mr. Justice Field then goes on to hold that as the demurrer is not in the transcript, and as it was not put into the record by the bill of exceptions, there was nothing of record that this court could review.

So we say, in the case at bar, that as the motions alleged to have been filed by the plaintiff in error or appellant, and as the answer offered to be filed, have not been put in the record by a bill of exceptions, or in any other way, there is nothing here that can be reviewed by this court.

The case of *Young* v. *Martin* has been followed and applied frequently, but we shall content ourselves with the following citations:

Insurance Company v. *Sea*, 21 Wall. 158, 162;
B. & P. R. R. Co. v. *Trustee*, 91 U. S. 127, 133;
Hanna v. *Maas*, 122 U. S., 24, 26;
Malony v. *Adsit*, 175 U. S., 281, 286;
Met. R. R. Co. v. *Dist. of Col.*, 195 U. S., 322, 330.

In *Hanna* v. *Maas*, above cited, Mr. Justice Gray said:

> The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains.

In that case the bill of exceptions contained an exhibit purporting to contain a report of all the evidence introduced at the trial, with minutes of certain parts that were objected to. Another exhibit to the bill consisted of what purported to be the charge delivered to the jury by the trial judge, followed by what appeared to be stenographer's notes of a conversation between the judge and counsel of both parties, interspersed with remarks of either counsel that he "excepted," etc. This court refused to consider the questions sought to be reviewed by the writ of error, and refused to supply the deficiencies of the bill of exceptions by considering the exhibits annexed to it, and in concluding the opinion Mr. Justice Gray said:

> But to assume to do that would be to take upon ourselves the duty of drawing up a proper bill of exceptions, a duty which belonged to the excepting party, and should have been performed before suing out the writ of error. This we are not authorized to do. Our duty and authority are limited to determining the validity of exceptions duly framed and presented. The defendants having failed to reduce their exceptions to such a form that this court can pass upon them, the judgment must be affirmed.

In *Pomeroy's Lessee* v. *State Bank*, 1 Wall., 592, 598, there was a bill of exceptions, but the plaintiff in error did not include therein the ruling of the court that the trust deed was the paramount title. This court held that if the plaintiff in error had desired to sue out a writ of error to revise that ruling, he should have excepted to it at the time it was made. In disposing of this point, Mr. Justice Clifford said:

> He insists that he did so, because it is so stated in the minutes of the case as it appears in the transcript, and the insuperable difficulty in supporting that proposition is, that nothing of the kind appears in the bill of exceptions. Where exceptions are taken to the ruling of the court in the course of a trial to the jury, such a notice is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of preserving the rights of the party in case the verdict should be against him and he should desire to have the case re-examined in the appellate tribunal, but it was never supposed that such an entry could be of any benefit to the party unless he seasonably availed himself of the right to reduce the same to writing and take proper measures to have the bill of exceptions sealed by the presiding judge at the trial, or, in other words, such an entry in the minutes can only be regarded as evidence of the right of the party seasonably to demand a bill of exceptions, but it is not the same thing, and has never been so considered in the federal courts, or in any other jurisdiction where the rules and practice of the common law prevail.

The most that can be said in favor of the order signed by Judge Burford is that it preserved and set forth the order of the court and was the means of preserving the rights of the parties in the case, should either of them

see fit to avail himself of the right to prepare and submit a bill of exceptions for the signature of the judge, but it did not relieve the defendant from the duty of presenting a bill of exceptions. See *Menten* v. *Shuttles*, 11 Okla., 381, and cases cited.

3. The order signed by the trial judge in the case at bar does not purport to be, nor can it take the place of, a bill of exceptions. It was nothing more than an elaboration of the journal entry made by the clerk. It does not pretend to be, nor is it, a bill of exceptions prepared by either of the parties for the purpose of saving any error that may have been committed by the trial judge in his rulings. Evidently it was made and signed in conformity with the provisions of the Oklahoma Code of Civil Procedure relative to the manner of giving and entering judgment as set forth in Ok. Stat. (1903), sec. 4300, *et seq.* We quote the following:

> 4305. All judgments and orders must be entered on the journal of the court and specify clearly the relief granted or order made in the action.
>
> 4308. The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. . . .

And section 4432, in another article, is as follows:

> Every direction of a court or judge made, or entered in writing, and not included in the judgment, is an order.

An examination of this record will show (pages 18, 42, 49, 50) that Judge Burford signed thus all orders and the final decree.

Such an order as the one here sought to be reviewed,

though signed by the judge, cannot perform the functions of a bill of exceptions, even though sec. 700, Rev. Stat., should be held to allow a bill of exceptions to cover rulings and orders of an interlocutory nature.

In *Salina Stock Co.* v. *Salina Creek Irri. Co.*, 163 U. S. 118, a case appealed from the Supreme Court of the Territory of Utah, this court said:

> Without denying the authority of this court to find error in the judgment of the Supreme Court of a Territory, even in passing on a question of practice, we certainly should not feel inclined to exercise such authority unless we were able to perceive that injustice had been done; and as this record presents us with no statement of the facts to enable us to determine whether the facts found were sufficient to sustain the judgment rendered, and with no exceptions taken to rulings in the admission or rejection of evidence, there is nothing here which we can examine.

So, in the case at bar, the plaintiff in error or appellant has failed to make this court "able to perceive that injustice had been done," and he so failed in the face of plain and positive statutory provisions, to say nothing of the numerous decisions of this court and of the Supreme Court of Oklahoma. Therefore he has no right to ask this court to make a bill of exceptions for him and then review what was done by the courts below.

V.

Vacating or Modifying Orders.

Plaintiff in error or appellee could have applied to the trial court to vacate or modify the order he is complaining of here.

Sec. 4760 of Wilson's Statutes of Oklahoma (1903), contains these provisions:

> The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made: . . . *Fourth*, for fraud practised by the successful party in obtaining the judgment or order. . . . *Seventh*, for unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

In the next section, 4761, it is provided that "the proceedings to correct mistakes or omissions of the clerk, or an irregularity in obtaining the judgment or order shall be by motion, upon reasonable notice to the adverse party or his attorney in the action."

And in the following section, 4762, which refers to section 4760, it is enacted that "the proceedings to vacate or modify the judgment or order, on the grounds mentioned in subdivisions four, five, six, seven, eight and nine, . . . shall be by petition verified by affidavit, setting forth the judgment or order, grounds to vacate or modify, and the defense to the action, if the party applying was defendant. On such petition, a summons shall issue and be served as in the commencement of an action."

Please observe these sections also:

> 4763. The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying and deciding upon the validity of the defence or cause of action.
>
> 4764. The judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defence to the action on which the judgment is rendered; . . .

These statutes gave the defendant below the right to ask for relief in the way of vacating or modifying the order complained of here if he really had *a valid defense or cause of action.* On that point the defend antbelow has persisted in keeping all courts in ignorance.

In the way indicated by those statutes, the defendant below could have litigated every question that he wishes this court to consider now, but he preferred to go to the Supreme Court of the Territory for appellate relief in spite of this provision in sec. 4436, Okla. Stat. (1903):

> The Supreme Court may reverse, vacate or modify a judgment of the district court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. The Supreme Court may also reverse, vacate or modify any of the following orders of the district court or a judge thereof: *First*, a final order . . . . *Third*, an order that involves the merits of an action, or some part thereof.

Applying this statute to the case at bar, we submit that the order here assailed is not a final order because it was within the power of the plaintiff in error or appellant to have it vacated by making the proper showing, and it was not an order "involving the merits" of the action in any sense. It was purely an interlocutory order, dealing with the proceedings of the case and having no bearing on "the merits of the action."

By omitting to make use of the privileges extended him by sections 4760–4764, and by taking the case to the Supreme Court of the Territory in the face of section 4436 the plaintiff in error or appellant has laid himself liable to the imputation of trifling with the courts and with the course of justice as provided by the statutes.

VI.

Refusing Leave to File Answer.

The order of the trial court refusing to permit the filing of the answer of A. W. Bennett, unless within five days he should comply with the previous order of the court for the payment of temporary alimony and attorneys' fees, cannot be reviewed here.

Assuming, for the sake of the argument, that the question is properly saved by the record, we submit that unless there is an obvious violation of the Oklahoma statutes, or of a fundamental rule of a court of equity, or a clear abuse of the discretion of the court, the ruling of the trial court on the offer of A. W. Bennett to file his answer cannot be reviewed here.

We again call the attention of the court to the fact that neither the District Court Journal nor the signed order of the judge shows a motion in writing, or a proffered answer in writing, or a bill of exceptions, but we insist that even if such pleadings were in the record, it was clearly within the exercise of the discretion of the trial court to make the order referred to, and that the subject or the ruling is one which cannot be reviewed by this court, unless it should be obvious that the trial court violated the Oklahoma statutes, or a fundamental rule of a court of equity, or was guilty of a clear abuse of discretion.

1. The Oklahoma statutes contain the following provisions of interest in this connection.

In Article 8 of the Code of Civil Procedure of Oklahoma, Stat. (1903), relating to pleadings in civil actions, are these sections:

3962. The pleadings are the written statements, by the parties, of the facts constituting their respective claims and defences.

3963. The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleadings in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code.

3964. The only pleadings allowed are: *First*, the petition by the plaintiff. *Second*, the answer or demurrer by defendant. *Third*, the demurrer or reply by the plaintiff. *Fourth*, the demurrer by the defendant to the reply of the plaintiff.

Thus it appears that defendant should have proffered a written statement, in the form of an answer, setting forth the facts constituting his claim or defense. That he utterly failed to do; neither did he show any reason or excuse for the failure.

The character of the answer that defendant might have proffered is described by sec. 4546, as follows:

> The defendant, in his or her answer, may allege a cause for divorce against the plaintiff, and may have the same relief thereupon as he or she would be entitled to for a like cause if he or she were plaintiff. When new matter is set up in the answer, it shall be verified as to such new matter by the affidavit of the defendant.

This would seem to authorize a pleading in the nature of a cross petition or cross bill, but there is nothing in this record to disclose the nature or contents of the answer which was offered to be filed but rejected by the court. The trial court was entitled to know all about the answer the defendant wished to file.

The plaintiff complied with the statutes and caused a summons and an *alias* summons to be issued and served.

The subject of the actual service of the summons is covered by section 3937 *et seq.*, Okla. Stat. 1903. Section 3938 is as follows:

> The service shall be by delivering a copy of the summons to the defendant personally served, or by leaving one at his usual place of residence, at any time before the return day.

Concerning the issuance of the summons and its contents, there is this language in section 3933:

> It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; . . .

Among the general rules of practice and pleading in the Oklahoma Code of Civil Procedure (1903) are the following:

> 3983. The answer or demurrer, by the defendant, shall be filed within twenty days after the day on which the summons is returnable; . . .
>
> 3984. The court, or any judge thereof in vacation, may, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or by an order enlarge such time.

Thus we show that the defendant was obliged to answer the demurrer within twenty days after the return day, and that the court might, in its discretion, and upon such terms as might be just, allow the answer to be made or other act to be done after the time limited, or might by an order enlarge the time.

It is clear that the trial judge, by the order which is here attacked, kept himself clearly within the provisions of the statute. Defendant had neither answered at the time or times named, nor had he complied with the order of the court. He was in default nearly a year.

These statutes clearly conferred the right on the court to do the very thing that was done by virtue of the order copied in the transcript at page 42.

2. The order of the trial court did not deprive defendant below of his rights under other statutes of Oklahoma of a strikingly just and equitable nature. The defendant, without the filing of an answer, was competent and had the right to testify in the case.

Section 4558, Okla. Stat. (1903), is as follows:

> In any action for a divorce hereafter tried, the parties thereto, or either of them, shall be competent to testify in like manner, and respecting any fact necessary or proper to be proven, as parties to other civil actions are allowed to testify.

This section clearly gave both parties the right to testify. The defendant, although in default for an answer, had the right to testify.

This statute is in harmony with but goes farther than the rule in equity stated in 2 Dan. Chan. Pl. & Prac., side p. 1119:

> A person who is interested in the result of an issue, but who refuses to be a party to it, may, nevertheless, be allowed to attend the trial by counsel; and he will, in such case, be included in the common order for the production of documents.

See, also, *Beckford* v. *Skewes*, 10 Sim. 193, and the comment of Mr. Justice White in *Hovey* v. *Elliot*, 167 U. S near bottom of page 432.

Section 4556, Okla. Stat. (1903), is as follows:

> Upon the trial of an action for a divorce, or for alimony, a court may admit proof of the admissions of the parties to be received in evidence, carefully excluding such as shall appear to have been obtained by connivance, fraud, coercion or other improper means. Proof of co-habitation, and reputation of the marriage of the parties, may be received as evidence of the marriage. But no divorce shall be granted without proof.

This statute makes it impossible for a trial court to grant a divorce without the production of evidence of a conclusive character and in harmony with the well-established rules. Of course this statute governs the proof as to the ownership of property by the defendant and its value, as well as every other essential allegation in the petition.

The legislative intent was that both parties to the suit should be allowed to testify, and that decrees in divorce cases should not be entered without affirmative proof. Nothing was to be taken without proof, nor should a divorce be granted on default alone. In every case there should be a trial and evidence adduced.

The trial court would not have refused the defendant the privilege of testifying had he offered himself as a witness. Defendant would have been allowed to introduce witnesses in his own behalf, as well as to testify himself. *Hazard* v. *Durant*, 12 R. I., 99. He did not make such offers. He stood on his refusal to comply with the just and equitable rules and orders of the court. He defied every rule, practice and principle of a court of equity, and now, forsooth, he asks relief from a court of equity!

3. We submit that there was not a clear abuse of the discretion of the court, nor the obvious violation of a fundamental rule of a court of equity, in the making of this order.

This court has frequently held that matters resting entirely in discretion are not re-examinable in a court of errors, and that there can be no departure from that rule in this court without overruling the settled practice from its organization.

Pomeroy's Lessee v. *State Bank*, 1 Wall. 592, 598;
Packet Co. v. *Sickles*, 19 Wall. 611, 615;
Van Stone v. *Stillwell*, etc., *Mfg. Co.*, 142 U. S. 128, 134;
Earnshaw v. *United States*, 146 U. S. 60, 68;
Mexican Cent. Ry. v. *Pinkney*, 149 U. S. 194, 200, 201;
Pullman's Car Co. v. *Cent. Transportation Co.*, 171 U. S. 138, 146.

In *Packet Co.* v. *Sickles*, above cited, the court below struck out two pleas of the statute of limitations, because not filed within the time prescribed by the rules of practice, and in considering the question as to the right of the court below to strike out those pleas, Mr. Justice Miller said:

> The right of a court to prescribe rules and regulate the time and manner of filing pleas is beyond question, if they are reasonable, and such rules are indispensable to the dispatch of business and the orderly administration of justice.

The learned justice then went on to state that the party assigning error on such rulings should be bound to exhibit in his bill of exceptions so much of the rule or rules as affects the question. In the case at bar there

is a rule for the particular case stated in the order of the court. That rule appears to be reasonable, just and proper. If there had been any facts in existence which made it clear that the trial court should not make the rule or order, they should have been exhibited in a bill of exceptions, and not being so exhibited this court is bound to refuse to review the action of the court below.

Again, in *Earnshaw* v. *United States*, above cited, it was said by Mr. Justice Brown:

> The general practice is too well settled to admit of doubt that where the action of an inferior tribunal is discretionary, its decision is final.

In that case the trial had been adjourned by the board of appraisers, and the order of adjournment was assailed in this court, but it was held that the board was entitled to the benefit of the general rule that some presumption is to be indulged in favor of the propriety and legality of their action, and that with respect to their methods of procedure they are vested with a certain discretion which will be respected by the courts, except where such discretion has been abused manifestly, and the board have proceeded in wanton disregard of justice and right. That doctrine is equally applicable to the case at bar.

In *Mexican Cent. Ry.* v. *Pinkney*, cited above, the third assignment of error was that the trial court erred in refusing to permit defendant to file its plea to the effect that plaintiff was not a resident and citizen of the State of Texas at the time the suit was filed, and that it was the right of the defendant to show, and the duty of the trial court to hear, at any stage of the trial, that plaintiff had wrongfully mis-stated his residence and citizenship in the attempt to fraudulently confer jurisdiction upon the court. The opinion was written by

Mr. Justice Jackson, and it was held that the matter covered by the third assignment of error was purely within the discretion of the trial court and was therefore of no avail in this court, and that mere matters of procedure are purely discretionary matters for the consideration of the trial court and not reviewable in this court, unless a gross abuse of that discretion should be made to appear.

A case that we have not yet cited, but the argument in which seems to be conclusive of the case at bar, is *Hovey* v. *Elliott*, 167 U. S., 409, and as it is relied upon by the plaintiff in error or appellant, we may be pardoned for speaking of it at some length.

In that case the Supreme Court of the District of Columbia ordered the answer of the defendant in a chancery suit then pending in that court to be stricken from the files and a decree to be entered that the bill be taken *pro confesso* against him, simply because he was held to be guilty of contempt in neglecting to pay into court money held by him, which was the subject of controversy in the suit, and declining to appear when summoned to do so. This court held that although the Supreme Court of the District of Columbia possessed plenary power to punish for contempt, unlimited by statute, yet it had not the right to summon a defendant to answer and then, after obtaining jurisdiction by the summons, and after answer filed by the defendant, strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof, and without a hearing, on the theory that he had been guilty of a contempt of court. The opinion, a very learned one, was written by Mr. Justice White, who considered at length all aspects of the questions of law involved. The learned justice first shows it to be fundamental that the judgment of a court should not be pronounced against

a party without hearing him, or giving him an opportunity to be heard. See pages 409–419. Next, Mr. Justice White (pages 423–444) reviewed the cases and authorities, both English and American, in which it was held that it is within the power of the court to refuse to grant a favor to one in contempt, and to refuse to allow such party to file a pleading uutil he shall have purged himself of contempt, and he showed that the following English cases and authorities support that rule:

Phillips v. *Bucks*, 1 Vern. 227;
Roper v. *Roper*, 2 Vern. 91;
Maynard v. *Pomfret*, 3 Atk. 468;
Vowles v. *Young*, 9 Ves. 172;
Anonymous, 15 Ves. 174;
Heyn v. *Heyn*, Jacob, 49;
Howard v. *Newman*, 1 Moll. 221;
Odell v. *Hart*, 1 Moll. 492;
Chuck v. *Cremer*, 1 Coop. ch. c. 205;
5 Chitty Equity Index, 4366;
1 Dan. Chan. Pl. and Prac., side pp. 504, 505;
Gilbert Forum Romanum, 102;
Bacon's Abridg., Sequestration C.

The American cases adhering to that rule, so far as they are reviewed by Mr. Justice White, are—

Johnson v. *Pinney*, 1 Paige, 646;
Ellingwood v. *Stevenson*, 4 Sandf. Ch. 366;
Brinkley v. *Brinkley*, 47 N. Y., 40, 49;
Rutherford v. *Metcalf*, 5 Hayw. (Tenn.) 58, 61;
Saylor v. *Mockbie*, 9 Iowa, 209, 212;
Hazard v. *Durant*, 11 R. I. 195.

That lengthy review of those cases and authorities was made for the purpose of showing that they did not support the action of the Supreme Court of the District of Columbia in striking out an answer *already filed* and rendering the decree *pro confesso* as a judgment for a contempt.

Mr. Justice White quoted with approval 1 Daniell's Chancery Pleadings and Practice, side pages 504, 505, where it is said:

> The rule, that a party in contempt cannot move until he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily and asks for an indulgence; and, therefore, a defendant cannot object to a case being heard because the plaintiff is in contempt.

In other words, a party in contempt must clear himself of the contempt when *he comes forward voluntarily and asks for an indulgence.*

Mr. Justice White also approved of the decision in *Johnson* v. *Pinney*, 1 Paige 646, where the chancellor granted the application of a defendant, after an order had been entered closing the proofs, for a motion to take the testimony of a witness. Objection was made that the defendant was in contempt for not paying a bill of costs on a motion previously made by him to dissolve an injunction in the suit. In granting the application, upon terms, the chancellor said:

> It is a general rule that a party cannot apply to the court for a favor while he is in contempt.

Again, Mr. Justice White approved *Brinkley* v. *Brinkley*, 47 N. Y. 40, 49, in which, after reviewing the authorities, it was held that a court which has control of its own proceedings can refuse the benefit of them to a party in contempt, *when asked as a favor*, and can prevent him from taking any progressive proceedings against his adversary, but it has no power to stay him in his proceedings by motion or appeal, where the object is to rid himself of the alleged contempt, or show that the order which he did not obey was erroneous.

The learned justice also approved *Ellingwood* v. *Stevenson*, 4 Sandf. Ch. 366, where the bill was taken *pro confesso* when a defendant was in default for not answering but made a motion to open the default and for other relief. There the vice-chancellor said:

> The motion to open the default for not answering would be granted upon terms, but for the contempt for which the attachment is ordered. His application is made to the favor of the court, and he cannot be heard until his contempt be purged.

For a review of these three cases by Mr. Justice White, see pages 436, 437 of the report.

And on page 444, Mr. Justice White said:

> Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit.

We submit that while that question was not adjudicated in *Hovey* v. *Elliott*, it is squarely involved in the case at bar, *if saved in the record*, and that the cases and authorities massed and considered by Mr. Justice White in *Hovey* v. *Elliott*, pages 423 to 444, inclusive, demonstrate that the Oklahoma trial court was justified in requiring A. W. Bennett to comply with its previous order within five days as a condition precedent to the filing of an answer.

The signed order of the trial court on that subject (Rec. 42) is as follows:

> Whereupon the defendant, Albert W. Bennett, by his attorneys, offered to file his answer in this cause, instanter, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court, heretofore made, to pay to the plaintiff in this cause the sum of one thousand dollars as and for temporary alimony and one hundred dollars as attorneys' fees in this case, but made the further order that the said defendant should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order within that time; to which order of the court the defendant, Albert W. Bennett, excepted at the time.

This order shows, in the first place, the refusal of the court to permit A. W. Bennett to file his answer and the reason for that refusal; and in the next place, it shows that he "should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order within that time." If this order can be said to be in the record without the filing of a bill of exceptions, it is clear that it does not violate any well-established rule of a court of equity. On the one hand, it exacts compliance with the order of the court previously made, and then declares that such compliance will be considered as purging the contempt, whereupon the defendant should be permitted to file his answer. The defendant saw fit to fail to comply with this later order and to continue in contempt of the previous order of the court. The defendant was given every opportunity from May 23, 1903, the date of the former order, until five days after April 8, 1904, the date of the latter order, within which to comply with the terms of the former. Surely there was no abuse of discretion

by the trial court. Moreover, there can be no doubt at all that had he complied with the former order, the plaintiff in error or appellant would have been allowed to file an answer at any time up to and including the day of the trial, April 29, 1904.

Even at the time of the trial the petition was not taken *pro confesso* as against the defendant, although a default was taken against him then. Had a decree been entered *pro confesso*, in accordance with the equity rule, 1 Dan, Chan. Pl. & Prac., side page 517, the trial court would have made an order "that the facts of the bill shall be considered as true," and the decree would have been against him "according to the equity arising from the case stated by the plaintiff." All this would have been done without introduction of evidence, but it would have been in violation of the Oklahoma statutes previously cited. The court observed those statutes and required the material averments of the petition to be established by the testimony of witnesses. The decree shows affirmatively (Rec. 45) that evidence was introduced by the plaintiff and that recital proves conclusively that the Oklahoma statutes were complied with.

We submit that the trial court neither violated the statutes of Oklahoma, nor the well-established rules of a court of equity, nor abused its privileges in the exercise of discretion, in making the conditional order permitting the filing of the answer, nor in the trial of the case itself.

The decree also forever disposed of the original order of the court for the payment of temporary alimony and attorneys' fees by this order, found near the end of the decree (Rec. 49):

> It is further ordered by the court that the order heretofore made for the sum of $1,000.00 as tem-

> porary alimony for plaintiff and $100.00 as and for her attorneys' fees, is hereby vacated and set aside.

This final order on that subject relieved the defendant of the burden of the original order, and released him from the charge of contempt so far as his failure to comply with that order was concerned.

We submit that there is nothing in the record to show that the plaintiff in error or appellant has been deprived of any right given to him by the federal laws or statutes, or the statutes of Oklahoma, or the well-established rules of a court of equity. In *Allen* v. *Georgia*, 166 U. S. 138, 140, this court said:

> Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.

That language was quoted with approval in *Hovey* v. *Elliott*, 167 U. S. 443.

In the case at bar, it may be that the plaintiff in error or appellant had some defense or claim in the nature of a cross action that should have been presented in the form of an answer, but he did not exhibit it to the court by an answer in writing, nor bring such answer into the record in any manner or form. It follows that it does not appear that he has been deprived of one of those fundamental

rights the observance of which is indispensable to the liberty of the citizen, and that this court would not be justified in holding that there had been a failure of due legal process.

Moreover, it clearly appears that the plaintiff in error or appellant wilfully and persistently disobeyed the orders of the court for about one year, and thus deprived himself of the right to plead except as a favor. He who asks a favor should not come with drawn fist. He forfeits rights who wilfully disobeys the law.

VII.

Order for Temporary Alimony.

That order was lawfully made and was lawfully vacated afterwards. It follows that it was neither reviewed nor affirmed below.

It is assigned here as error (Rec. 2-6), with relation to the order for temporary alimony, that the Supreme Court of Oklahoma erred in affirming the action of the trial judge at chambers in ordering that the plaintiff in error pay into the office of the clerk of the court, for use of the defendant in error, $1,000 temporary alimony and $100 attorney's fees, without due and sufficient notice having first been given to plaintiff in error and an opportunity afforded him to be heard in opposition thereto. Concerning this we submit:

1. That order was not affirmed because it was not appealed from as it might have been on the authority of *McKinnon* v. *McKinnon*, 10 Okla. 400.

2. The record shows affirmatively that the plaintiff in error or appellant had due and sufficient notice and opportunity. The notice is printed (Rec. 17). It informed

the defendant below that the application for temporary alimony, etc., would be submitted to the trial judge at chambers May 23d. The notice was served in person on the defendant below, and an exact copy of the application was offered to him but he refused to receive it (Rec. 15, 16). The verified application is printed on pages 16 and 17 of the record. In the absence of positive proof to the contrary, it certainly cannot be maintained here that the plaintiff in error or appellant did not have due and sufficient notice and an opportunity to be heard in opposition to the motion.

3. If that assignment of error should be urged by the plaintiff in error or appellant, in spite of the foregoing propositions, we would again ask the attention of this court to that part of the decree of the divorce (Rec. 49), which reads as follows:

> It is further ordered by the court that the order heretofore made for the sum of $1,000 as temporary alimony for plaintiff, and $100 as and for her attorneys' fees, is hereby vacated and set aside.

This final order on that subject not only relieved the defendant of the burden of the original order and released him from the charge of contempt, so far as his failure to comply with that order was concerned, but made it impossible for him, after the rendition of that final decree, to appeal to the Supreme Court of the Territory from the original order for the payment of alimony and counsel fees. An order which has been vacated and set aside prior to the appeal to the Supreme Court of the Territory, could not be considered by that court, nor is it entitled to consideration here, as we respectfully submit. *The right to review that order perished when the decree of divorce was entered and signed, because the original order was vacated thereby.*

4. The original order cannot be reviewed because there is nothing in the record to show it to be "exorbitant, or unreasonable," or founded in an "abuse of discretion." *McKinnon* v. *McKinnon*, 10 Okla. 400.

IX.

The Contempt.

The "contempt" spoken of in the order of the trial court, as well as in other portions of this record, was nothing more than the disobedience of the previous order of the court to pay temporary alimony and counsel fees.

The brief for plaintiff in error and appellant, or at least that part of it on pages 13 *et seq.*, proceeds on the theory that there is involved here the question of a contempt of court in the strict sense and, therefore, that the appellant must have been dealt with under the statutes of Oklahoma or not at all. Such a rule of law would make it impossible for a trial court to exercise any form of judicial discretion on the failure of a party to comply with an order, and would drive the court to proceed by means of a proceeding for contempt *per se* and punish it by fine and imprisonment, no matter how inadequate that method might be, or how unnecessary such a struggle might be, or how great the obloquy incident to such an accusation and conviction.

The power of a court to proceed and punish as for a contempt in the strict sense has been and is inherent in the courts of all English speaking countries, and yet the courts of those countries have exercised the discretion in many cases of refusing to allow a delinquent party the privilege of pleading without first making a satisfactory showing on the subject of his disobedience, and such reasoning as that advanced in the brief of plaintiff in error

and appellant does not seem to have stood in the way in one instance. The courts were doing merely what they had the right to do in the exercise of a sound discretion, and from that point to the point of proceeding as for a contempt *per se* is a far cry indeed. The distinction between the two seems to be perfectly clear.

When one comes into a court of equity he must come with clean hands, especially if he asks a favor of the court he has wronged by disobeying its order, and when he does not come in that way the court, in the exercise of a sound discretion, may refuse to hear him or allow him to plead, *and he cannot assail the action of the court in that respect because it did not fine and imprison him.*

The Oklahoma statutes on the subject of contempt are but the enactment of the common law definitions of contempt *per se*, and they do nothing more than that. They do not rob the courts of their inherent right to exercise a sound discretion in such a case as this, nor make it incumbent on a court to punish before it grants a favor. These statutes are not shields for the protection of disobedient parties; they are swords that a court may use or not.

We respectfully submit that the judgment of the court below should be affirmed.

JOHN EMBRY,
W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Defendant in Error and Appellee.